



Comparative Report on Labour conflicts and access to justice: the impact of alternative dispute resolution

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About ETHOS

ETHOS - Towards a European Theory Of Justice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

Executive Summary

This comparative report is the 5th deliverable of ETHOS WP6 “Struggles for justice”. D6.1. established the theoretical framework; D6.2. dealt with official discourses and non-institutional resistance in the context of the 2008 financial crisis; D6.3. and D6.4 approached different institutional mechanisms to ensure economic justice, citizens’ participation and the continuity of the European Social Model (ESM) and the present deliverable aims to understand if alternative dispute resolution (ADR) mechanisms are functional instruments to improve access to labour justice.

In a context of a high unemployment rate, the dismantling of the welfare state and attacks on collective bargaining – as addressed in the previous deliverables - this report questions whether national individual ADR mechanisms are useful tools for claiming labour rights and accessing labour justice. Six national teams were asked to write a report based on a two phases’ research methodology: a) desk research aiming to describe the main ADR mechanisms available; b) empirical work that involved interviews to key informants in order to produce a critical analysis of ADR mechanisms concerning access to justice. The present comparative report relies partially on national reports and unfolds in three parts. The first examines the rise of ADR in Western societies and the lively discussion around it; the second focuses on labour justice and ADR in Europe; and the third involves a descriptive and a critical analysis of labour ADR in the six countries on a national level.

In order to assess the effectiveness of ADR in claiming labour rights and accessing labour justice, we have identified five dimensions of the variable of proximity justice: geography, costs, time, culture and visibility. Geography appears to be a less relevant variable in order to compare ADR and courts’ accessibility. Contrastingly, empirical data show that costs and time are two dimensions of proximity in which ADRs tend to present clear cross-country advantages when compared to courts. Cultural or human proximity is an important proximity dimension in this report. The creation and development of dispute resolution forums that use common sense language and familiar routines, being at the same time trusted by citizens, may reduce the distance between litigants and justice institutions.

The European landscape of labour justice also reveals a less optimistic side of labour ADR reality. The national realities illustrate that ADRs need more visibility and publicity so that citizens acknowledge them as an option to litigate. Solving this issue by making them compulsory is a contested decision as the volunteer character is a crucial feature, at least for mediation. Other ADR risks underlined in this report include the following: the creation of a dual justice system, with courts serving first class citizens, and ADR serving second class citizens that cannot afford or understand courts procedures; the inexistence of mechanisms to balance power relations and the reproduction of societies’ power asymmetries. Concerning labour ADRs in particular, two main concerns are raised: a) the possibility of reproducing the power imbalance between the employer and the employee; and b) the weakening of collective struggles as a result of an investment on individual litigation.

Despite remaining challenges, this report illustrates that ADR can contribute to the promotion of access to justice, making it possible to remedy situations in which individual rights are threatened. A process in which citizens think of a solution to their conflicts and speak for themselves, potentially promotes legal empowerment.

In light of the foregoing, this deliverable has identified policy recommendations that emerge from the study of labour ADR mechanisms in Europe. Below we shortly present some of them.

- Countries must invest on promoting the visibility of ADR. Information must not be only available online or on the phone to citizens who search for it. There must be campaigns.
- Organisations must be informed about the possibility of including clauses, incorporating references to mediation and conciliation, in their key policies and employment documentation, including employment contracts.
- Parties need to be clearly informed in detail about the substantive ADR procedures before accepting its use.
- In labour disputes in particular, it is crucial that workers are well informed about their labour rights. Legal information must be available before the beginning of a mediation, conciliation or arbitration.

- Strong ethical ADR codes, continuous adequate training for ADR professionals and regular evaluation of these mechanisms performance must be part of a global strategy of investment in this field.
- In countries where individual alternative labour dispute settlement is lacking, it would be necessary either to establish out-of-court dispute resolution bodies specialised on individual labour law cases or to expand the competence of existing collective labour dispute agencies to cover individual cases.
- Decisions making the ADR in individual labour conflicts obligatory should be revisited
- ADR must not be viewed as a second-class justice, but citizens' own choice when they recognize there are a better option. In case of being mandatory there must be, as in a first instance court, the possibility of appeal.
- The investment of labour ADR must be complementary to the investment in other forms of ensuring labour justice: social dialogue structures, labour rights and other forms of social protection that define Europe as a common political project based on people and not simply legal engineering compatible with a neoliberal world based on markets.

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List of Abbreviations

Acas	Advisory, Conciliation and Arbitration Service
ADR	Alternative Dispute Resolution
CBA	Collectively bargained agreements
CJEU	Court of Justice of the European Union
DRPs	Dispute Resolution Processes
EC	Early Conciliation
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ESM	European Social Model
EU	European Union
ODR	Online Dispute Resolution
LMS	Labour Mediation Service
IMF	International Monetary Fund
ILO	International Labour Organization
CoE	Council of Europe
Acas	Advisory, Conciliation and Arbitration Service
DGJP	Directorate General for Justice Policy
GDLR	General Direction of Employment and Labour Relations

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INTRODUCTION

This report is the fifth deliverable (D6.5) of the sixth workpackage (WP6) of the project *Towards a European Theory Of Justice and fairness* or ETHOS. ETHOS seeks to provide building blocks for the development of an empirically informed European theory of justice, among other things, by enhancing the awareness of the mechanism that impedes the realisation of the justice ideals that live in contemporary Europe. WP6 specifically focuses on European barriers to economic equality between countries and people and the various forms of non-institutional and institutional struggles for justice in Europe. The present comparative report must be read as the final deliverable of a three parts' analysis as described below and represented in table 1.

i. D6.5 report under WP6 structure

The first deliverable (D6.1) framed theoretically the workpackage by reviewing the conceptualization and articulation of justice in dominant economic theory (Caldas, 2017). The second (D6.2) was an empirical deliverable that addressed official discourses, inequalities and non-institutional resistance from vulnerable groups in the context of the 2008 crisis (Meneses *et. al.*, 2018). The subsequent reports focus on institutional resistance to injustices, namely whether European Union and Turkey have institutional mechanisms to resist injustices. The aim is to understand whether the EU and Turkey have common and national mechanisms to ensure distributive justice, citizens' participation and the continuity of the European Social Model (ESM) even when it is threatened by international financial conditions or the political choices of national leaders (see table 1).

D6.3 is a legal report that discusses to what extent fundamental social rights as enshrined in the European Charters can or cannot constitute a counterweight to austerity measures in times of crisis (Vries & Barbara Safradin, 2018). D6.4 and D6.5 are empirical studies that address the effectiveness of institutional instruments to improve and access labour justice from different angles. The former discusses if social dialogue is an effective instrument to collectively negotiate labour law. This deliverable focuses on access to justice in Europe. Taking into account that mounting situations of social injustice have been paralleled with increasing shortcomings in the institutionalised response of judicial systems, this report tries to understand whether alternative dispute resolution (ADR) mechanisms are functional instruments to improve the access to justice. In the sequence of the previous deliverables and taking into account the required balance between aims and means, we opted to focus on labour justice and labour ADR.

WP6 main issues	Del. Number	Del. Type	Keywords	Type(s) of justice The 3 R's
Part I Justice in dominant (neoclassical) economic theory.	D6.1	Theoretical Conceptual	Economizing on justice	Redistributive
Part II Official discourses after the 2008 crisis, inequalities between and cross countries and non-institutional resistance to injustices	D6.2	Theoretical Statistical Empirical	Austerity society Struggles for justice	Redistributive Recognitive Participative
Part III EU institutional resistance to injustices (fundamental laws, social dialogue and access to justice)	D6.3	Legal	Fundamental social rights	Redistributive
	D6.4	Theoretical Empirical	Social Dialogue Labour Justice	Participative Redistributive
	D6.5	Theoretical Statistical Empirical	Access to justice ADR Labour Justice	Redistributive

ii. Labour justice and ADR

Labour justice in this report and the previous one (Araújo & Meneses, 2018) is used in the sense of fair labour relationships between employers and employees in the formal labour market. It is a condition to achieve social justice and implies the treatment of labour not as any other commodity, but as the balance of unequal power relations between employees and employers. It directly relates to distributive justice principles since strong workers' rights contribute to reducing economic misdistribution.¹

Guaranteeing rights is more than the formal declaration of them. Access to justice is an essential feature of any democratic society. Mounting situations of social injustice have been paralleled with increasing shortcomings in the institutionalised response of the judicial systems. In the twentieth century, the development of the Welfare State and the consequent juridification of social welfare paved the way for new fields of labour, civil and administrative litigation. This reality, coupled with increased family incomes and changes in family behaviour and marital strategies, resulted in an explosion of litigation, which gave greater social and political visibility to the courts. Back in the 1980s, after the welfare state began to show signs of erosion, there were already indicators of a crisis in the judicial system, which showed an increasing inability to respond to the raising of the demand for its services (Santos, 1982: 9). Although judicial courts have generally benefited from more financial and human resources, a better qualification of human resources and the development of new information technologies in the 1990's, there was

¹ In the previous report the idea of participative justice was also present as labour justice was being addressed from the perspective of citizen's participations in social dialogue processes. For a discussion of justice in Europe through the lens of the Nancy Fraser-inspired categories of redistribution, recognition and representation, see D2.3 (Knijn *et al.*, 2018).

an “explosion of litigation”, with justice being “colonised” by debt collection and, in urban areas, having to cope with the increase in theft crimes, namely larceny and robbery (Pedroso and Trincão, 2004: 198).

According to Bonafé-Schmitt (1988), the “legalistic-liberal” model is increasingly inadequate to regulate conflicts generated by a more massified life, as a consequence of population growth and concentration, be it in cities, factories, or large housing blocks. The exponential increase in litigation in justice statistics does not mean, according to the author, that societies are more conflictual. Social reality has changed and challenged places of socialisation and conflict resolution that were once found within the family, the neighbourhood, and the community. As a result, there was a moment of seemingly contradictory movements in regard to the institutions of justice. On the one hand, citizens have critical positions and are distrustful of a slow, expensive judicial apparatus, wrapped in complex procedures and archaic language. On the other hand, paradoxically, there is an increasing demand for courts.

The concept of alternative or informal justice includes the Alternative Dispute Resolution (ADR) movement, whose philosophical roots go back to the discussion on promoting access to law and justice in the 1960s and 1970s in the United States. ADRs propose new models or the reconfiguration of old mechanisms and seek to reduce costs and adversarial impact. They are characterised by the use of a set of conflict resolution mechanisms such as negotiation, conciliation, mediation and arbitration. The first three are consensual forms of resolution in which those involved in the problem, with or without third party intervention, decide the outcome. Arbitration, binding or non-binding, resembles jurisdictional ways of resolving disputes, insofar as the problem is solved by a decision of a third party, the arbitrator (Pedroso et al., 2002; Pedroso *et al.*, 2003; CPR, 1995).² In the area of labour law, Alternative Dispute Resolution (ADR) consists of a set of procedural mechanisms that have been adopted to assist the judiciary system to make labour rights more speedily and easily recognized, and as such implemented at both the collective and individual level (Grandi, 2014).

Labour disputes can be either collective or individual. On the one hand, when parties to a dispute (e.g. employer and employee) fail to agree on the existence or scope of an individual right as protected in labour legislation or in the employment contract, we talk about individual labour disputes. On the other hand, collective labour disputes refer to disputes on rights and interests such as disputes related to wage and other social benefits, and those that concern the amendment and establishment of collective agreements. As such, when disputes do not have an influence on the total workforce, they can be considered as individual labour disputes (Hiruy Wubie, 2013: 48). This report will focus on individual disputes and ADR. Bendeman suggested that “ADR offers a means of bringing workplace justice to more people, at lower cost and [...] it also helps to clear the backlog of cases at statutory dispute resolution institutions and is thus assisting government agencies to meet their societal responsibilities more effectively (Bendeman, 2007).³ We recognize though that if the promotion of ADR serves only to clear the courts of what is considered the relevant litigation, it might be problematic.

The choice for the word “alternative” is many times contested with the claim that these mechanisms should not be alternative, but complementary to judicial courts. For the evaluation of its role on access to justice we use a combination of literature about similar realities that received different names: “informal justice” (Abel, 1982; Mathews, 1988; Van Krieken, 2001; Wojkowska, 2006), “popular justice” (Merry, 1992, 2003; Merry and Milner, 1993) and “proximity justice” (Deu, 2006; Bastard and Guibentif, 2007; Wyvekens, 2008). More important than the choice of a name to frame the discussion is to keep in mind that extrajudicial justice includes a great diversity and

² The differences will be clarified in the point 1.2 of the report.

³ It is noteworthy to mention here that the collective character of labour justice has already been addressed in the previous deliverable, i.e., the report on social dialogue (D6.4) (Araújo and Meneses, 2018).

the analysis must be context sensitive. Alternative dispute resolution bodies may operate in models annexed to or close to the courts or be independent and work as neighbourhood or community justice forums.

iii. Aims and object in the in the context of the previous results

Participative and redistributive principles are in counter-cycle with the current “economising on justice” approach as described by José Maria Castro Caldas on D6.1 (Caldas, 2017). According to that report, in the last decades of the 19th century political economy underwent a process of transformation aimed at removing from the discipline premises, which supposedly precluded it to fulfil the requirements of positive science. This led economists to “economise on justice” by seeing the discipline of economics as a value-free science, indifferent to or even adverse to redistributive justice claims. As demonstrated, this “economizing approach” that was considerably expanded since the 1970’s is now leading to detrimental practical implications in respect to the realization of social justice. The author argues that the separation between economy and moral philosophy is not obvious and unavoidable and the “economising on justice” approach has detrimental practical implications in respect to the realization of social justice. The conclusion is that reconciling the study of the economy with justice may require a revival of political economy based on presently marginalised traditions, allowing for a fruitful cross-fertilization with other social sciences.

Caldas’ main argument must be taken seriously. D6.2 shows how economy is surpassing justice as European economic policy is not aligned with social justice premises but rather with the rules of financial markets. Right after the crisis, although the EU kept the discourse of the knowledge society and economy it put in place economic and social policies countering the notion of social investment and placing the OMC⁴ in suspension or on a secondary plan. Since 2010, Europe has converged to a neoliberal vision on overcoming the crisis and promoting competitiveness, becoming increasingly close to the global project of international institutions such as the IMF in terms of structural adjustment and austerity measures. Therefore, for most countries of the EU, namely the ones under the Troika interventions, or others under IMF Stand-By Arrangements, the recipe became similar (Meneses *et. al.*, 2018). Countries were affected in different ways as they started from diverse starting points and went through distinctive austerity levels and structural adjustment measures, but also the logic of inequalities pervaded national societies with some groups being particularly affected. The outcome is, therefore, the intensification of polarization both between and inside countries. The narrative of inevitability and absence of alternatives combined with the threat of a future that will certainly be worse than the present seems to leave citizens with only two possibilities: resignation to the loss of rights or non-institutional resistance (Santos, 2017).

However, as was already discussed in D6.4 (Araújo & Meneses, 2018), the EU was built over a unifying and protective umbrella - the European Social Model - that should distinguish Europe from the US and provide tools to protect citizens from uncontrolled neoliberalism (Judt, 2005; Hermann, 2017). Rights, progress and efficiency come together in the narrative over which the European Union stands. Ideals associated with labour justice, distribution and participation are at the core of this model. Increased minimum rights on working conditions and strong and well-functioning social dialogue are two defining elements of the ESM. Individual labour contracts ruled by the laws of the market are celebrated between parties with unbalanced levels of power. As stated by Katsaroumpas (2018), “while economic liberals found freedom and equality in this contractual exchange, others pointed to the distorting image of freedom of contract as ignoring the inequality of bargaining power against the employee, the bureaucratic nature of the enterprise and the character of employment relationship as one of ‘subordination’ and ‘authority’

⁴ The Open Method of Coordination (OMC) was a soft law instrument for achieving convergence in matters of working conditions, workers’ welfare and participation, labour market inclusion and equality.

producing dependencies and ‘democratic deficits.’ Before the crisis, social dialogue structures - and the ESM in general - were already under pressure even in countries where they were deeply rooted. The stronger social dialogue models were better equipped to come up with solutions to protect workers and economies. In Austria and Netherlands, the long and strong tradition of welfare state and social dialogue allows them to better cope with a worldwide crisis, protecting citizens and economy. The UK social dialogue and welfare self-destruction or the attacks on the already fragile social dialogue systems in Portugal, Hungary and Turkey were not part of the solution, but of the problem.

D6.3 identified several policy recommendations that could allow Europe to move towards a more effective social rights protection for European citizens: elevation of the so-called social principles into real enforceable rights that have the same equal status as civil and political rights; the Court of Justice could recognize more explicitly the significance of the CoE Social Charter in fundamental social rights protection at EU level; the EU legislator should involve the European Social Charter in legislative proposals as initiated by the European Commission; more awareness should be created on the use of the EU Charter in the judicial domain; the EU should prioritize the EU’s accession to the European Social Charter to better integrate its internal market rationale with its social dimension. Re-thinking the division of powers, and particularly whether it is desirable to extend Europe’s competences when it comes to the social pillars, remain important questions for today’s social justice experience of European citizens (de Vries and Safradin, 2018).

However, as it was mentioned, it is not only the statement of rights that needs improvement. Persons in vulnerable situations are, on the one hand, more likely to have their rights violated and, on the other, are less likely to have the skills to represent themselves and the resources to hire legal representatives. When recognized legal scholar Marc Galanter stated that the utopia of access to justice is a not a condition in which all disputes are fully adjudicated, he focused the argument on the financial and psychic advantages of other types of solutions, but also recognised the benefits of the uncompromised mechanisms of rigidity of the procedural rules of the courts (Galanter, 1981, 1983). In other words, access to justice can include “[...] not only access to a dispute resolution mechanism that is binding and solves the case but also direct negotiation or access to a sort of first line procedure through which the dispute may or may not be solved (Stuyck *et. al.*, 2007).”

The main question of concern that this study has answered is the following: in the context of high unemployment rates, of the dismantling of welfare state and of the attacks on collective bargaining (as described and discussed in the previous deliverables), are individual ADR useful tools for accessing justice and claiming labour rights? In other words, do those instruments improve access to justice or do they reproduce the vicious circle of unequal access to justice and unequal power relations between workers and employers? Though this is the main goal, there is a larger horizon that we will partially explore: understanding the potential of ADR in promoting legal “legal empowerment”. We use this concept in the sense of “the use of law and justice systems (formal and informal) by marginalised groups or individuals to improve or transform their social, political and economic situation” (Domingo & O’Neil, 2014: 13). Though we realise that this ambition is too large for the time frame and the extension of this research we intend to draw some reflections on this topic in order to make a contribution to a discussion about the potential of ADR to counter the rising vulnerability and social exclusion as experienced by vulnerable groups.

iv. Methodology

The study covers research in five EU member states (Austria, Hungary, Netherlands, Portugal and UK) and in a non-EU member state, Turkey. In each one, a national team conducted research according to shared guidelines that established two main methodological phases: desk research and field work. The first phase included two steps:

literature review and documental analysis. In the first part, rapporteurs describe the ADR mechanisms for labour conflicts available in each country, i.e. institutions that use mediation, conciliation or arbitration. Participants were asked to include formal ADR forums and other institutions that use ADR mechanisms to solve conflicts. The reader can find information on who created ADR; where do they work; which type of conflicts they accept; who can mobilize it; how is it mobilized; how does it work; how are the conflicts solved; what is the volume and type of litigation received per year; what is the duration of conflicts' resolution and what impact do media have in this matter (did the media give coverage in such a way to accelerate the resolution?).

The second moment was guided by the final objective of the ETHOS project: walk towards an empirically informed European theory of justice and fairness. It was not possible to discuss the importance of ADR without listening to the voices of people directly involved. National rapporteurs combined the desk research information with information collected to interviewees to key informants. These were chosen among state officials, private parties responsible for the creation of ADR, members of employer's confederation, members of trade unions and third parts of ADR (mediator or arbitrators). In the interviews, national rapporteurs were free to ask the question they thought to be more relevant for their context, but in a general way, as the main objective was to examine perceptions and the role of ADR on access to justice and balancing inequalities, the interviews were designed to answer the following questions:

- Why were labour ADR created? What were the objectives?
- Are the objectives being accomplished? Are they working how it was expected?
- Are they culturally closer to citizens? (Are they less formal? Do they use a language that citizens understand? Do they use simple procedures easily understandable by everyone?)
- Are they faster?
- Is their use expensive or cheaper than courts?
- Do they reach more adequate solutions or do they end up imposing repressive decisions?
- Do they favour access to justice? To whom?
- How different are the perceptions given by labour actors, employers and state representatives?
- Is the volume of solved conflicts relevant or is non-significant?
- Do they have a significant role for the struggle against social injustices?

The goal of field work was to learn from key actors who could offer different perspectives on national practices. Due to the significant difference in national realities - the importance, dissemination and forms of ADR mechanisms differ significantly in each country – and also due to time constraints, researchers were given some autonomy to adapt their methodology to the time frame, available resources and country specificities⁵. Table n. ° 2 represents a general methodological overview of the structure of each national report as indicated in the guidelines for this deliverable:

⁵ UK national rapporteurs used a partly different approach to fieldwork and analysed a Acas-commissioned evaluation on ADR and justice theory (Kirk et al,2019). Still, semi-structured interviews were made with trade union representatives and employer representatives. Added to those, the experience of workers was drawn from data gathered by the study Citizens Advice and Employment Disputes (CAB-EMP) (Kirk et al,2019). The research CAB-EMP examined how workers access justice in cases of labour disputes, specifically the procedure after the first visit to the Citizens Advice Bureaux. This was part of a larger research programme entitled 'New Sites of Legal Consciousness: A Case Study of Advice Agencies in the UK' (Kirk et al, 2019). From this study, UK national rapporteurs identified five cases studies which are analysed and described in the national report.

	Methodological steps	Aims
Part I Desk research	Step 1: Literature review Step 2: Analysis of documents and statements issued by actors involved in ADR in Europe	ADR landscape description
	Step 3: Interviews to	
Part III Fieldwork	<ul style="list-style-type: none"> • State officials • Private parties responsible for the creation of ADR in case private ADR are relevant • Members of employers' confederations • Members of trade unions • Third parts of ADR (mediators or arbitrators) 	Critical analysis of ADR mechanisms concerning access to justice

vi. Report structure

This report unfolds in three main parts, each with two sections. Part I examines the rise of the ADR movement in Western societies, including the justice reforms and the preferred ADR mechanisms. It provides a definition of ADR, which involves the methods of negotiation, conciliation, mediation and arbitration. Based on the review of literature from legal theorists, legal sociologists and anthropologists it also presents some of the main arguments of a discussion about ADR and access to justice that was very lively mainly between the 1980' and the end of the 20th century.

Part II takes a closer look at ADR in the labour domain and in Europe. It focus on the characteristics of settling labour disputes through ADR in Europe, a domain in which ADR has a long tradition (ILO, 1933), and moves then to a discussion about EU and ILO's recommendations on this field.

Part III relies on the national reports adding a comparative and empirical grounded approach. In a first moment, it gives an overview of the national individual ADR landscapes, focusing on the main forms identified by national teams. In a second moment, the aim is not to present a systematic comparison between countries, but an empirically grounded analysis of the leading question. National reports' data, results and arguments are discussed against the issue raised in the first part of this report.

PART I – ADR IN THE WEST

1. The ADR movement in the Western societies

1.1. ADR in the context of access to justice waves and justice reforms

A set of comparative studies co-ordinated by Mauro Cappelletti and Bryant Garth in the 1970s identifies measures taken by various countries in the mid-1960s to mitigate barriers to access to law and justice by dividing them into three waves. The first wave, beginning in 1965, consisted of a movement to provide legal services to low-income citizens. The second wave in the 1970s sought to extend this legal representation to the protection of diffuse interests, such as those of consumers or environmentalists. The third wave began in the same decade and focused on out of court dispute resolution bodies and their procedures, based on a less formal form of action. According to Cappelletti and Garth, these developments particularly concern the US context, but they have also been influential in Western Europe; it is even fair to say with common tendencies, although with geographic specificities (Cappelletti and Garth, 1978, 1981).

Pedroso *et. al.*, who also conducted a comparative study, categorized a set of justice reforms into four types. The first concerns the quantitative increase in resources; the second with better management of resources; the third with technological innovation and the fourth with the “elaboration of ‘alternatives’ to the formal and professionalized model that has dominated the administration of justice”. For the present discussion, the innovations related to the last-mentioned reform are particularly interesting. These include, according to the authors’ concepts, alternative or informal justice and dejudicialisation (Pedroso et al., 2003: 39-41).

1.2. ADR preferred mechanisms

One of the characteristics of alternative means of conflict resolution is the use of mechanisms other than adjudication, such as negotiation, conciliation, mediation and arbitration. The first three are consensual forms of dispute resolution, which resembles the idea that those involved in the problem decide - with or without the intervention of third parties – upon the result. Arbitration is closer to adjudication, and thus to jurisdictional modes of conflict resolution, insofar as the problem is settled by a decision of a third party, the arbitrator, whose decision binds the parties (Pedroso et al. 2002: 34).

Negotiation is a process, developed with minimal intervention or without the intervention of a third party, in which the parties involved in the dispute dialogue with a view to identify a solution to the problem. When acting, the third party serves only as a transmission belt for the proposals presented on both sides (Vezzula, 2005).

In conciliation, a third party makes suggestions and proposals so the parties in dispute can reach a consensus. This mechanism treats disputes more superficially than mediation and serves situations in which the parties usually do not have a continuing relationship (e.g. road accidents, buying and selling of objects, assaults between strangers) (Vezzula, 2005).

Mediation involves a more in-depth treatment of the problem and is appropriate in situations involving multiplex human relationships (e.g. family, labour relations, long-time traders).⁶ The philosophy of this mechanism is based on the conviction that the parties know best themselves how to resolve disputes. The mediator does not impose any decision. Instead, it is the responsibility of the mediator to create conditions for dialogue, to investigate the real problems and to help create and evaluate options for a fair, equitable and durable outcome, accepted by both parties (Vezzula, 2005). Mediation is defined by scholar Zahorka as “a process where the parties to a dispute – in labour relations: the employer and the labour union – invite a third party, the mediator, to help them resolve their differences; the mediator has no power of decision concerning the conflict between the parties, but helps to find and reach a mutually acceptable and voluntary reached solution” (Zahorka: 2018). This means that in mediation, as distinguished from litigation and arbitration, the parties maintain control over their disputes and its resolution, and do not have to refer their case to a final decision by a third party.

1.3. Diversity and hybridism

The ADR movement is characterised by great diversity. ADR bodies may operate under models attached to or close to the courts or be independent and provide examples of neighbourhood or community justice. It is not just a broad reality, it frequently assumes hybrid forms (Adler, 1993).

A typical example of hybrid models is mediation-arbitration, a procedure in which the mediator-arbitrator acts as mediator and, in case of failure, becomes, at the request of the parties, an arbitrator who makes recommendations and resolves the dispute pointing to a decision (Pedroso *et al.*, 2003). Other examples of ADR that have developed alongside the classic models are:

- the Early Neutral Evaluation, in which a dispute-neutral professional (in most cases a lawyer) listens to the parties and issues a non-binding opinion that serves to predict the possible outcome in court that forms the basis of an agreement;
- the mini-trial court, in a more informal and flexible format in terms of procedural rules, should allow for the clarification of the dispute, and for parties to acquire a more realistic perception of the problem and reach a settlement;
- the ombudsman or public advocate, an independent third party with the power to investigate, criticise and make public recommendations;
- the expert's report, in which an expert assesses and issues a decision which may or may not be binding; and
- the multi-door courthouse, a broader structure, where various modes of conflict resolution are offered, including ADR and judicial litigation and the litigant should choose the one that best fits his/her claim (Frade, 2002)

For Adler, the common denominator of these initiatives is negotiation. This concept does not limit itself to the formal definition of negotiation while mechanisms of dispute resolution, but rather with the use given to it by Galanter (1981):

⁶ The concept of multiplex relations was first elaborated in the context of legal sociology by Max Gluckman (1955). Multiplex relationships are comprehensive relationships with multiple interactive dimensions that extend beyond the moment of conflict.

Most disputes, under current rules, could be brought to a court are in fact never placed on the agenda of any court. This includes criminal as well as civil matters. Many of these disputes are “resolved” by resignation, “lumping it”, “avoidance”, “exit” or “self-help” by one party.

Of those disputes pursued, a large portion are resolved by negotiation between the parties, or by resort to some “forum” that is part of (and embedded within) the social setting within which the dispute arose, including the school principal, the shop steward, the administrator, etc. Negotiation may range from that which is indistinguishable from the everyday adjustments that constitute the relationship to that which is “bracketed” as a disruption or emergency. Similarly, embedded forums may range from those which are hardly distinguishable from the everyday decision-making within an institution to those which are specially constituted to handle disputes which cannot be resolved by everyday process.

The variations include differences in deadlines, outside review of settlements, monitoring of the bargaining process, and the threat of penalties for bad-faith bargaining. Nonetheless, according to Adler, the goals are the same:

a negotiated end to the matters in dispute, a negotiated consensus on future relationships, or negotiated agreements that streamline the issues in contention (Adler, 1993: 68, 69).

2. ADR and access to justice⁷

According to Roger Mathews (1988), the beginning of the justice-informalization movement is marked by a wave of optimism, followed by a wave of pessimism just a mere decade later. Matthews argues that the introduction of more informal litigation models did not result from a well-formulated and carefully implemented policy. Instead, it rather resembled a practice in search of a theory. For many of its supporters, the benefits of the informalization movement were almost too obvious to require articulation. As studies and analyses emerged, they took two main forms, one positive and another more negative. During the first wave, the focus was on a set of factors that were intended to be reflected on the course of action: increased participation; more access to law and justice; deprofessionalisation, decentralisation and delegalisation (“the three Ds”); minimum level of stigmatisation and coercion (Mathews, 1988: 4-8).

During the second wave, there was an increase in scepticism about the good intentions of the state, and a growing conviction that, after being absorbed and rationalised, social processes would lose their essence and serve mainly to expand the State itself (Mathews 1988, Abel 1982, Santos, 1990). To some extent, pessimism arose in reaction to some exaggeration on the part of the advocates of informalism. The reality of the late 1970s presented some anomalies that optimists did not anticipate on, such as the continued expansion of the judiciary. The number of professionals and paraprofessionals increased, as well as the complexity and opacity of the judicial system (Mathews, 1988).

2.1. The multiple dimensions of proximity

⁷ For an extended discussion on the topics addressed in this section, see Araújo (2014).

The field of law is characterised by individuals who share a habitus that distances them from the rest of society (Bourdieu, 1987). Judicial courts may be strange and distant places to ordinary citizens. The distance of citizens to the administration of justice is linked with economic, social and cultural factors. The economic factors include, for example, court settlements and costs; attorneys' and other professionals' fees, such as experts; transport costs; and costs resulting from delinquency. These costs are proportionally higher for small-value actions, which victimises the popular classes (Santos *et al.*, 1996: 486, 487). With regard to social and cultural obstacles, citizens with lower resources tend to have a poorer understanding of their rights, having more difficulty recognising as legal a problem that affects them and hesitating more to go to court even when they recognise that they are facing a problem. This results from a negative experience with justice, explained by the difference in quality between the legal services provided to the higher-income classes and those provided to lower-income classes and the fear of receiving reprisals in case of recourse to the court. (Santos *et al.*, 1996: 487). But even if they recognise the problem as legal and wish to go to court, other difficulties may prevail.

Focusing on the French movement of "proximity justice", without an idealized view of reality and attentive to problems, Wyvekens notes that proximity justice has been a way of addressing three problematic aspects of the justice-society relationship: people, geography and time. The idea of "human proximity" requires a less formal way of dealing with cases, consideration for the parties' expectations and the use of clear language for the users. It also evokes the idea of "justice douce" (soft justice) as referred to by Bonafé-Schmitt (1992), i.e., treating criminal cases in a less severe form. The concept of "geographical proximity" refers to the physical distance between legal bodies and citizens, and has been a constant concern in the history of proximity justice. Finally, the concept of "time proximity" is associated with the idea that it is not enough to be close; as such, justice must act quickly (Wyvekens, 2008). This triangle of proximity as defined by Wyvekens - culture, geography and time - summarizes in a structured way the advantages that have been widely recognised by several studies, not only in the European context, but also in the African context. To this triangle we can add the vertex of economic proximity, since as a rule, informal justice is a less expensive option than civil litigation through judicial courts. At the same time, we also may want to consider the variable of "visibility" which involves the question: can citizens identify informal justice forums? Do they recognize their existence and identify them as a means to access justice? (Araújo, 2014).

2.2. The elasticity of imagination and the continuity of relations

ADRs favour mini-max solutions over zero-sum solutions. In the latter, also known as adjudication decisions or winner-defeated decisions, the distance is extended between those who win and those who lose. In mini-max solutions, the goal is to maximize the compromise between opposing claims so that the distance between the winner and the defeated is minimal or, if possible, does no longer exist. The resolution of the dispute is left in the hands of the parties, allowing them to treat the resolution of the dispute and participate in the construction of the decision (Mathews, 1988: 5; Santos *et al.*, 1996: 48).

In many cases, the formal dispute is not clear about the real causes of the conflict. Resolutions that resort to mediation or other non-adversarial methods tend to subvert the separation between the real conflict and the processed dispute, "a separation that dominates the procedural structure of the law of the capitalist State and is primarily responsible for the superficiality of social conflict in its legal expression" (Santos, 1988: 22, 23). As Menkel-Meadow argues, the courts have "limited remedial imagination" and are not necessarily the best institutional solution to resolve the disputes that continue to be addressed to them (Menkel-Meadow, 1996).

2.3. Dual justice or plurality of choices?

In addition to the more optimistic features of ADR, some criticism is raised among various academics and private actors. The first relates to the idea that informal justice serves only to discharge the judicial courts of litigation or even to relieve the State of commitments towards part of the population and thus constitutes second-class justice.

In the countries of the North, justice informalization reforms have been largely motivated by pending legal proceedings. According to de Sousa Santos, the intention was to relieve the courts of small and repetitive disputes that were not profitable in terms of professional practice, either of judges or of lawyers and, in this sense, informalization meant the social devaluation of the disputed relations (Santos, 1990: 27). Critics say that if cases are considered serious, they are invariably prosecuted in court, with clear legal procedures and a set of guarantees. Informal courts, on the other hand, serve as Matthews argues as repositories of “less serious 'junk' cases” (Mathews, 1988: 10, 11). In addition, there are doubts about the effectiveness of the measures in terms of relief from the judicial movement. What seems to have happened in the past years is that many cases that would be solved by themselves or that would disappear were admitted to the new instances, consequently formalising the informal, which ends up disturbing the tranquillity of the informal negotiating spaces located in what was called in the late 1970's 'the shadow of law' (Mathews, 1988: 11, 12).

The idea of junk cases is quite problematic. The fact that a conflict is not judiciable does not mean it is irrelevant to a citizen and does not substantially disrupt their lives (Araújo, 2014). Providing an opportunity to resolve it within a flexible forum can be an advantage if that forum is considered legitimate by the litigants and offers a solution deemed appropriate. However, the parties do not always prefer flexible and informal mechanisms and this issue must be considered, given that too much informalism may hinder the rational regulation of terms and as Matthews argues “in an emotionally charged situation defendants want procedural safeguards and formal frameworks in which to negotiate agreements” (Mathews, 1988: 12).

2.4. Reproduction of asymmetries or social transformation

Another point of criticism concerns the asymmetries of power of societies and the alleged incapacity of informal justice to annul them. Behind a mask of neutrality, informal ADR mechanisms can serve to reinforce inequalities and promote “compromises” that benefit the most powerful party. In such cases, mediation can become repressive because it lacks coercive power to neutralize differences of hierarchy between the parties. It is therefore necessary to consider whether the final solution results from a mutual agreement or from the vulnerability of the participants (Santos, 1982; Mathews, 1988).

Many authors denounce what has come to be called the “ideology of harmony”, accusing defenders of informal or alternative justice to deny the asymmetry of powers within society. Pedroso *et al.* recognize the need to take into account the risks of inequality between parties, of manipulation, of subtle coercion, of the effects of routinisation that can make out-of-court dispute resolution unfair to those with less social and/or bargaining power. It is necessary to ensure that parties can defend their rights and that the third party is not imposed, even subtly, by social structures, but rather presents the most accessible, fast, and efficient means of protecting their rights. At the same time, “there is no reason to not develop in all areas of litigation (labour, criminal, civil, etc.) the possibility of individual or collective parties to settle their litigation by consensus and in accordance with rules of fairness, seeking redress and not victory over the other litigant” (Pedroso *et al.*, 2003: 38, 39).

The problem here is serious and should be considered within the various contexts studied and for all forms of justice, from the more formal to the more informal forms. As Hespanha says:

To suppose that this 'indigenous right' is the seat of harmony, egalitarianism and justice corresponds to an Edenic idealization of 'primitivist' or 'neoliberal' contour. On the contrary, it has already been mentioned that the processes of community constraint are often oppressive and suffocating orders, in addition to reproducing the local (de)balance of power (Hespanha, 1993: 28).

Considering the character of employment relationship as one of 'subordination' and 'authority' this concern is of ultimate relevance in this deliverable as we will discuss in more detail in the third part.

2.5. ADR and the state

Instead of viewing informal justice in general as the antithesis of the State, some question its ability to remain independent from the State. The criticisms are grouped in two categories: 1) informal justice tends to be contaminated by the logic that dominates the modern State, based on the superiority of the law of the State, an inflexible and positivist law, losing its virtuosities; and 2) the State uses informal justice to control its citizens.

The first criticism is focused above all on the forums for dispute resolution born within the impulse of the State under processes of informalization, but not only. Many of the procedures, symbols, rituals, and forms of language used in popular justice derive from state law and, even the most ideologically distant instances of the State borrow some of their forms (Merry and Neal, 1993: 5). Abel states that there is considerable historical, comparative and contemporary evidence concerning the reaction of formalism against informalism. The author compares the attempt to preserve informalism in an environment in which legal institutions dominate that of building socialism in a single country, that is, that it will always be politically undermined. Thus, the tendency of the professional staff in informal institutions "may seek to enhance their status and authority by adopting the trappings of formalism: dress and address, procedures, power, etc. (although we must also ask why formality confers higher status)." (Abel 1982: 5). de Sousa Santos also expresses concerns in this sense and notes that informal justice duplicates, if not the forms, at least the logic of the forms of formal justice (Santos, 1990: 28). Focusing once more on the French case, Wyvekens argues that the French way of distributing justice or the vertical relationship between citizens and institutions is never radically questioned. The author also mentions that proximity justice is contaminated by the paternalism of the judiciary, that is, the idea of getting close to the community means establishing a vertical pedagogical relationship - in which the institution is the teacher - instead of placing citizens on a horizontal level with institutions (Wyvekens, 2008: 40, 41).

However, as Merry and Neal affirm, "not only does popular justice mimic state law, but state law tends to colonize popular justice" (Merry and Neal, 1993: 5). Several authors, in the wake of Foucault's work, accuse informal justice of "allow[ing] state control to escape the walls of those highly visible centres of coercion - court, prison, mental hospital, school - and permeate society" (Abel 1982: 6). For Abel, the main objective of informal institutions is social control and the expansion of the state to spheres that tend to flee to their area of penetration. According to the author, while formal institutions are largely passive and reactive, informal institutions can be purposive and proactive. They go over the fundamental liberal distinctions between public and private, state and civil society, what is forbidden and what is allowed and, in order to nurture their expansion, cultivate the appearance of being non-coercive. Thus, the retraction of the overtly coercive aspects of state control was a necessary complement to the expansion of less obvious coercive mechanisms (Abel, 1982: 5, 6). For Fitzpatrick, the idea of an informal justice, which opposes formal justice is a myth, the first being "[...] an extension of formal regulation, its mere mask or agent" (Fitzpatrick, 1992: 199). With regard to formal justice, de Sousa Santos, refers to the changes that have taken

place in Western societies since the sixties and seventies, and affirms that the State, by informalising itself, assuming a format that is similar to that of indirect government, “attempts to co-opt continued social relations”, that is, tends to articulate “cosmic power” (i.e. macropower, centralised, located inside formal institutions, hierarchically organised) with “chaosmic power” (i.e. micropower that emerges when social relations and interactions are unequal). The first corresponds to the traditional conception of legal-political power and finds its most complete fulfilment in state power. The second is present in the family, factory, school, church, club, etc. It is a chaotic power, without centre, without specific location. By informalizing itself, the state tries to co-opt the coercive power developed in the field of ongoing social relationships:

To the extent that the state tries to coopt the sanctioning power inherent in the social relations, it is explicitly connecting its cosmic power to the chaosmic power, which until now has been outside its reach. Insofar as the state thereby manages to control actions and social relations that cannot be directly regulated by formal law, and insofar as the entire social environment of the dispute is integrated in its processing, to that extent the state is indeed expanding. And it is expanding through a process that, on the surface, appears to be a process of retraction. What appears as delegalization is actually relegalization. In other words, the state is expanding in the form of civil society [...] And because the state expands in the form of civil society, social control may be exercised in the form of social participation, violence in the form of consensus, class domination in the form of community action (Santos, 1982: 262)

Likewise, Merry states that popular justice may be close to indigenous law in language and architecture and at the same time be subject to the supervision of the central government, and may serve more to reinforce the central power than the power of citizens (Merry, 1992: 168). Van Krieken (2001: 9) uses the “Trojan Horse” metaphor to illustrate this set of concerns.

At the same time, de Sousa Santos considers it inappropriate to observe the scenarios of informalization of justice only as sheer manipulation and state conspiracy. The author argues that although the powerful symbols of participation, self-government, and real community are trapped in an overall strategy of social control, their value is nevertheless confirmed since, even if controlled by the State, informal justice requires a certain amount of popular participation to function effectively and thus contains “a potential liberating element, if one can be unleashed and made effective only through an autonomous political movement of the dominated class” (Santos, 1982: 263). Abel himself, after staging overwhelming criticisms of the justice-informalization movement, ends with an encouraging note, arguing that if the goals of informal justice are contradictory, informalism should not be repudiated as if it were a demon or a marginal phenomenon to ignore. It is involved in a set of values and ideals that must continue to inspire the struggle for social transformation, like harmony over conflict, equality of access, citizens’ participation, familiarity of procedures (Abel, 1982: 310).

PART II – LABOUR JUSTICE AND ADR IN EUROPE

In the first part we have analysed the rise of the ADR movement in Western societies and its specific characteristics in comparison with civil litigation through courts. We have discussed in general terms the relation between ADR and access to justice, pointing to potential benefits and risks. In this second part, we will take a closer look at ADR in the labour domain. It will specifically focus on the characteristics of settling labour disputes through ADR in Europe, a domain in which ADR has a long tradition (ILO, 1933). Thereafter, the possible impact of EU and ILO's recommendations on ADR in labour disputes will be analysed.

3. From the origins of labour ADR to the present

The employment relationship and labour law have its roots in the industrialization that came into existence during the 19th and 20th centuries in Europe. Industrial mass production required hiring large numbers of people to perform designated tasks under instruction of their employer. In the 19th and 20th centuries the power imbalance experienced by workers in factories could only be taken up by collectivization in trade unions. Trade unions were at first prohibited. Only individual dispute resolution was recognized and other statutory laws that enabled the input of the employer as the decision maker. Evidence that came from the side of the worker was often disregarded, one example thereof is the old French *Code Civil*, stipulating: “Le Maître est cru sur son affirmation” (meaning: “the master’s word will be conclusive”) (Jagtenberg and de Roo, 2018: 173; Jagtenberg and De Roo 2009).

At the end of the 19th century, trade unions gained recognition across European countries as a way to counter social unrest resulting from the rise of communism. Many governments in Europe encouraged collective bargaining and stimulated the rise of informal mechanisms on labour dispute resolution such as conciliation and mediation. These forms of ADR were regarded as the most effective tools to urge negotiations within discussions among social partners (De Roo and Jagtenberg, 2018: 173)⁸.

These so-called collective disputes increasingly became recognized next to the individual (labour) disputes. As argued by Jagtenberg and de Roo, collective disputes not only deal with collectively bargained agreements (CBA) that have entered into force, but also focus on economic interests in which negotiations on future terms of labour contracts have resulted in a deadlock regarding negotiations. Recourse to ADR mechanisms - in particular mediation and conciliation and in some cases arbitration - occurs mainly on a voluntary basis. In rare occasions, such as during World War I and II, mandatory arbitration regimes were adopted by a majority of European governments. The rationale of these arbitration mechanisms was to disable strikes from disrupting the war industry (De Roo and Jagtenberg, 2018: 173)⁹. After World War II, Europe was disrupted and needed to initiate an integration process. One of the milestones that set off this process was the adoption of the European Social Charter in 1961 by the Council of Europe.¹⁰ Concerning ADR, the Social Charter stipulates in Article 6 (3) that the Member States should stimulate the social partners, consisting of both the industry and the unions, by enabling the use of ADR mechanisms such as conciliation and voluntary arbitration, for them.¹¹

⁸ See also De Roo and Jagtenberg, 1994.

⁹ See also De Roo and Jagtenberg 1994.

¹⁰ For a more detailed analysis of the impact of this document in times of crisis, see ETHOS deliverable 6.3 (Safradin and de Vries, 2018).

¹¹ European Social Charter (European Treaty Series no. 163, 1961).

With regard to individual employment disputes, the rise of socialism led to the adoption of various statutes that aimed to protect employees against unfair conditions at the workplace, dismissals and discrimination on the labour market. As such, it was possible for individual workers to derive their rights from collectively bargained agreements (CBA) by social partners, and/or statutory rights. These latter categories of rights are to be substantiated in courts. These courts also apply the CBA statutes that regulate an individual worker's contract under review. A majority of Member States that are party to the European Social Charter have labour courts in place.¹² Prior to civil litigation, conciliation and mediation are options that are offered to litigants in (labour) disputes, either integrated in the courts themselves such as in Germany by the *Arbeitsgerichte* and France *Conseil de Prud' hommes*, or annexed to these courts, which is the case in the UK with the Advisory Conciliation and Arbitration Service, which is linked to the Employment Tribunal System¹³ (De Roo and Jagtenberg, 2018: 174).

Grandi has categorized two levels of labour disputes, which can trigger ADR mechanisms to be invoked: 1) labour law disputes might objectively arise, at a first level, for the protection of some minimum standards from which no derogation is possible – according to the meaning of derogability/minimum standards as present at national level and as laid down in international institutions that protect fundamental rights (e.g. European Social Charter, EU Charter of Fundamental Rights); 2) labour disputes can arise at a second level, for the reinforcement and invocation of any other right that the applicable law, statutorily, collectively, or individually negotiated, has granted to the interested worker. Grandi calls this “accessory rights” (Grandi, 2014: 39). ADR procedural patterns could be the best in position to cope with it, because of their focus on simplification and the departure from “formality”.

4. EU and ILO's orientations toward ADR

The Eurofound survey has illustrated that in all negotiation-based strategies, mediation have become much more popular than arbitration as a means to settle employment disputes. De Roo and Jagtenberg explain this trend in a threefold way: “(1) the increasing complexities of the law that hamper arbitration but not mediation, (2) the fact that confidentiality is equally protected in mediations, while mediation fits in better with the tendency to promote teamwork, and (3) the fact that overburdened judges can initiate referrals to mediation but not to arbitration” (Jagtenberg and de Roo, 2016: 189).

In Europe the overburdened court system and the demand to lower the expenses of litigation were felt and recognized in the beginning of the millennium. This was reinforced in 2002, when the CoE adopted its Recommendation of the Committee of Ministers on 18 September 2002 (REC 2002), which urged EU Member States to enable and clarify the mediation process within their legal systems. Further, in 2004 the European Commission's Directorate of Justice and Home Affairs adopted a Code of Conduct for European Mediation Services and a proposal for legislation to ensure uniform practices and standards (SEC 2004/0251) (COD). This was followed in 2008 by the European Union Directive 2008/52/EC of the European Parliament and of the “Council of Certain Aspects of Mediation in Civil and Commercial Matters” providing a framework for cross-border mediation. This directive, which has been in force since 13 June 2008, required the European member states to implement necessary laws, regulations, and administrative provisions on cross-border mediation by 20 May 2011. In 2011 the European Parliament entered a Resolution regarding the implementation of the 2008 Directive (2011/2026 (INI)). In effect,

¹²Note that the Netherlands does not have a specialized labour court in place.

¹³ See UK report (Kirk *et. al.*, 2019)

individual states must regulate mediation in their own systems in order to meet the requirement for regulation of cross-border mediation.

Pedroso and Branco (2010) identified in 2010 that one of the European Union's goal in terms of justice was to extend the use of ADR, due to the importance of ensuring that citizens have appropriate qualified resources (Pedroso & Branco, 2010). Almost a decade later, can we still argue that the EU wants to promote ADR mechanisms? And if so, in what way, and for all disputes? Cátia Cebola (2011) concluded that these methods have an unconditional sponsorship from the European Union. This support emerges from the 1991 reunion of the European Council in Tampere, which focused on justice (Cebola, 2011). The conclusion of the reunion manifested the concern of the EC regarding access to justice and the complexity of the judicial and administrative system of each Member-State (European Parliament, 1999) and recommendation were clear: "alternative, extra-judicial procedures should also be created by Member States" (European Parliament, 1999).

In the past, the European Commission did adopt some Recommendations on ADR (98/257/EC and 2001/310/EC), which were mainly targeted at consumer disputes¹⁴. The first one dates back from 1998 and was a follow-up to the conclusions of the 1993 Green Paper 'on access of consumers to justice and the settlement of consumer disputes in the single market'. This recommendation established principles for ADR schemes to operate, essentially by describing an active intervention of a third party, in many cases an arbitrator, who was granted the discretion to find a solution in line with the following principles:

- Independence of the decision-making person/body
- Transparency of the procedure
- Adversarial principle
- Effectiveness as to the aspects of access, costs, time to decide, active role of the decision making body
- Principle of legality (no prejudice on the mandatory protection as granted by the national law)
- Principle of liberty (for the parties to accept a binding decision)
- Principle of representation.

In 2002, the European Commission (EC) published the Green Paper on alternative dispute resolution and commercial law (CEC, 2002). In the original text, the EC presented the growing interest towards ADR based on three main reasons:

1) There has been the increasing awareness of ADR as a means of improving general access to justice in everyday life;

2) ADR has received close attention from the Member States, many of which have passed legislation encouraging it;

3) ADR is a political priority repeatedly declared by the European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality. This political priority was specifically asserted in the context of the information society, where the role of new on-line dispute resolution (ODR) services has been recognised as a form of web-based cross-border dispute resolution (CEC, 2002).

¹⁴ Note that in the area of consumer protection, the EU has a legal basis to adopt legislation in the area of consumers disputes through ADR (e.g. under Article 169 of the TFEU).

Later in the same text we can find a reflection made about “Boosting the development of ADR in the labour relations area” (CEC, 2002).

52. ADRs are already a key component of dispute settlement in industrial relations in all the Member States. They have developed on the basis of specific procedures in which the social partners (representatives of employers and employees) predominate. ADRs in industrial relations have demonstrated their usefulness with regard to the resolution of individual and collective disputes relating to interests (on the adoption or modification of collective agreements that require the harmonisation of conflicting economic interests) and conflicts relating to rights (on the interpretation and application of contractual or regulatory provisions). Most ADRs in the field of industrial relations are organised by the social partners themselves. In the event of failure, they can then have access to ADR structures offered by the public authorities. Procedures vary from one Member State to another, but they are generally voluntary as regards both the decision to go to them and the acceptance of the outcome.

53. The fact that in most Member States these ADR facilities are available and used where the social partners themselves have not achieved a satisfactory result has prompted the Union institutions to consider the possible value of establishing European ADR facilities for transnational disputes. In its Communication of 28 June 2000, the Commission in the context of modernising the European social model, identified the creation of tools designed to prevent and mediate disputes as an issue to address. It declared its intention to “consult the social partners on the need to establish, at European level, voluntary mechanisms on mediation, arbitration and conciliation for conflict resolution”. The Commission has already begun preparatory work for this. It is financing a study on the modus operandi of industrial dispute resolution mechanisms in the Member States. The results should be available in April 2002 and will be distributed widely. The Commission is pursuing its reflections on the possibility of setting up European mechanisms, the value they would add and the way they would operate. The Council (Employment and Social Affairs) on 3 December 2011 welcomed the Commission’s intentions and called on it to report on the results of its consultations with the social partners on the need to establish European voluntary dispute resolution mechanisms. The Laeken European Council of 14 and 15 December 2011 stressed the “importance of preventing and resolving social conflicts, and especially trans-national social conflicts, by means of voluntary mediation mechanisms concerning which the Commission is request to submit a discussion paper.

Nevertheless, in the Green Paper we can find that the Commission wanted to wait for the reactions to the paper to determine the approach to the promotion of ADR in labour disputes at EU level. The reactions would help to highlight the importance of setting in place Community-wide rules on ADR. Another solution was for “the Commission to pursue its policy aimed at promoting research and cooperation with regard to comparative law, especially between universities and legal practitioners, including judges and experts” (CEC,2002: 23).

Following this, in 2008, the Directive 2008/52/CE of the European Parliament and of the Council presented another expression of the European enthusiasm in relation of ADR mechanisms in civil and commercial matters. The Provisions of this Directive are applied only to “mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes” (point (8)).

Not only European institutions approve ADR, but also the International Labour Organization (ILO) accords significant importance to these mechanisms. In the communication with the title *Collective Dispute Resolution through*

Conciliation, Mediation and Arbitration: European and ILO Perspectives (2007), the ILO conducts an assessment of some of the practices and experiences of the EU Member States with ADR. One important idea defended by the organization is designing strategies to prevent disputes as a significant aspect of good labour relations. Thus, they encourage governments to use dispute resolution agencies to provide information, training in handling discipline and grievances at work, preventing discrimination and building effective workplace communication (ILO, 2007:4).

Nonetheless, as the capacity to prevent a dispute from arising is limited, the ILO reiterates the importance of a dispute resolution system to be accessible in terms of costs and location, and which is open to all working populations without discrimination, which follow the main arguments to improve the use of ADR. Indeed, ILO specifies that “accessibility is also an issue for workers who might be excluded from the system such as non-unionized workers, supervisors, or those in the informal economy or in export processing zones” (ILO, 2007:9). In the conclusion, the following is stipulated:

We have also seen [in Europe] evidence from the standards set by the ILO and the experiences of the governments and social partners of the important interplay between freedom of association, the freedom to bargain collectively and a properly functioning dispute resolution system (ILO, 2007).

However, ILO does not identify the best approach among the different ADR systems existing in Europe. Also, in 2010, the EurWork examined the alternative dispute resolution mechanisms in Europe (2010) concluding that, at the time, it was too soon to see the impact of the recession on the number of cases being dealt with through ADR. Nonetheless, they identified a growth in the number of disputes going to court due to termination of employment (Purcell, 2010). The absence of data in all countries observed made the assessment on the success of mediation difficult. They still advanced with the idea that

[...] judicial ADR processes lead to a reduction in the number of labour court or tribunal hearings in about two thirds of applications. At the very least, this represents a substantial reduction in public cost, and all the evidence suggests that the time taken to deal with a case in conciliation is greatly reduced compared with lengthy court cases in many countries.

For Purcell, there is evidence that the use of ADR in individual labour disputes is increasing. He identified that since 2000, fifteen Member States have started some kind of initiative to support ADR and conclude that “there is likely to be an increased take-up of ADR in the future”.

A few years after the mentioned study, De Palo (2014) concluded in a research on the implementation of the 2008 Mediation Directive that “in order for mediation to be successful throughout the EU, there must be some level of compulsion to use some aspect of the mediation process” (De Palo et al, 2014). One of the concerns addressed in the report was the lack of publicity and public knowledge about mediation:

throughout the EU, people do not understand mediation, and the benefits it offers [...] [A] campaign will only succeed if it is uniform through all member-states as a funded EU initiative” (De Palo, 2014).

According to Palo and D’Urso (2016) “there is also no doubt that the fundamental goals of the Directive [2008 Mediation Directive] are far from being achieved” and “it has been shown many times that the current regulatory elements have no impact on the numbers of mediation” (De Palo & D’Urso, 2016). The authors propose the following changes in the Directive to improve the use of mediation:

[...] strengthen Article 5(2) of the Directive by requiring, not just allowing to require, the parties to go through an initial mediation session with a mediator before a dispute can be filed with the courts in all

new civil and commercial cases, including certain family and labour disputes where the parties' rights are fully disposable. This has been shown to have a significant impact in achieving a balanced relationship between mediation and judicial proceedings.

A proposed rewrite of article 5(2) could read as follows.

“Member States shall ensure that a mediation session is integrated into the judicial process for civil and commercial cases, except for such cases as Member States shall determine are not suitable for mediation. The minimum requirements for such a mediation session are that the parties must meet together with a mediator, subject to the condition that the procedure shall be non-binding and swift, suspend the period for time-barring of claims, and be free of charge or of limited cost if any party decides to opt out at the initial session”.

In their opinion, more economic research would show that a good relationship between mediation and court proceedings can “save billions of euros and millions of days from unnecessary litigation, every year” (De Palo & D’Urso, 2016). Not only the financial impact is considerable but also the social benefits, which should be an encouragement for EU institutions to act and make Member States act to improve the use of ADR. However, there are also voices against a stronger interference of EU institutions in the use of ADR by the Member States. Michel Benichou, former president of the Council of Bars and Law Societies of Europe (CCBE), warns in a communication dating from 2015 that despite the fact that Europe is in favour of ADR, “it is necessary to avoid excesses such as mandatory mediation or a new profession of mediators”, which reveals the distrust that still exists in the use of ADR mechanisms.

PART III – COMPARATIVE ANALYSIS

In this third part we rely on the national reports, adding a comparative dimension and an empirical grounded approach to the discussion. Although the main aim of this report is not descriptive and national realities are not always easy to compare, in the section 5 we introduce some comparative information that allows for a deeper understanding of section 6, in which we aim to answer the central question of our report: i.e. are national individual ADR mechanisms useful tools for claiming labour rights and accessing labour justice - in a context of a high unemployment rate, the dismantling of the welfare state and attacks on collective bargaining?

In all the six countries studied, there are some forms of ADR along with civil litigation through courts, though in Hungary only collective ADR exists. Section 5 gives an overview of the national individual ADR landscape, focusing on its main forms. It is important to mention from the outset that national ADR landscapes are heterogeneous and national reports that will be discussed in this section reflect the authors' sensibilities.

In contrast to the previous section, the aim of section 6 is not to present comparisons between the countries studied, but to provide for an empirically grounded analysis of the leading question concerning ADR, access to justice and labour justice. In this section, national reports' data, results and arguments are discussed in light of the problems presented in the first part of this report.

5. National Landscapes tables

The six countries studied have introduced new laws or procedures after 2000 to provide alternatives to court proceedings (e.g. mediation, conciliation and arbitration). In some of these countries, these innovations are closely linked to the need both to reduce the cost of court or tribunal cases and to speed up the process of disputes in labour matters.

In the Netherlands, three forms of ADR exist: mediation, arbitration and binding advice. For labour disputes, in most cases mediation is used as an instrument to solve cases out of court. Labour ADR gained momentum from the 70's and 80's. In this period:

it was clear that the Dutch population became increasingly dissatisfied with how the law functioned, mainly because of the inaccessibility of the courts, overcrowded dockets, increased formalism, long delays and high costs of civil litigation. These factors were strong incentives to consider other modes of dispute resolution. As such, these developments made it possible for ADR methods to rise in the Netherlands (Safradin, 2019).

Individual labour disputes, in particular through mediation, may be settled in two ways: either on the parties' (voluntary) own experience or by means of referral by a judge.

In the Netherlands, labour disputes are the second major practice (with family law disputes on the first place) area for mediators in the Netherlands. One of the explanations thereof could be found in the idea that labour disputes, like family disputes, are often centred around long-standing relationships, in this case between employees and employers (Safradin, 2019).

In Austria, ADR mechanisms in the labour market were created to offer an attractive alternative to solve conflicts and promote a swift return to a constructive working environment. From an institutional perspective ADR

instruments also aim to relieve courts from their workload, while for the parties involved, their aim is to offer a timely and financially attractive way to solve disputes arising in the labour market. Labour law conflicts, either between employer and employee or among employees, can be solved through civil law mediation. In addition, Austria offers an obligatory conciliation in cases of discrimination of people with disabilities, which was introduced in the wake of the implementation of the EU Directive on Equal Treatment in Employment and Occupation.¹⁵ Since the Chamber of Labour (*Arbeiterkammer*) does not cover the costs for arbitration, the number of labour law cases that end before an arbitration tribunal is rather low in Austria (Vivona, 2019).¹⁶

In the UK, the main system of intervention in employment is the Advisory, Conciliation and Arbitration Service (Acas). Acas takes place through a conciliation service that intervenes rapidly in Employment Tribunal claims, entails no direct financial cost for parties and seems to be positively evaluated by most of its users as well as (other) employers (Kirk *et al.*, 2019). Acas encourages parties to settle disputes themselves first through agreed procedures: only if the parties have not been successful in settling their disputes, the third party comes into play (Kirk *et al.*, 2019). At the same time, Kirk *et al.* argue in the UK country report that despite the positive outcomes of Acas in terms of time and costs, unions are critical concerning its capacity to deliver fair outcomes, and legal studies and empirical data suggest important pitfalls in terms of procedural and substantive justice:

When it does not conclude in a settlement, conciliation may lengthen the dispute resolution process in a way that imposes disproportionate burdens on precarious workers (Kirk et al., 2019).

In Hungary, ADR does not exist for individual labour disputes. The Labour Mediation Service has no competence in solving individual disputes. ADR methods are particularly used for collective disputes during regular wage negotiations, but - as opposed to the other studied countries for this deliverable - Hungary does not provide for ADR in individual labour disputes. Árendás argues in this respect, “in order to increase access to justice it would be necessary either to establish out-of-court dispute resolution body specialised on individual labour law cases, which could provide its service on a more cost-efficient way, thus parties could turn to this body to resolve conflicts before they terminate a labour contract; or the competence of the existing MVT SZ (Labour Advisory and Dispute Resolution Service) could be expanded to cover individual cases” (Árendás, 2019).

The Portuguese government is committed to stimulate the use of ADR in order to reduce the burden on the (labour) courts, but this seems to be the formal position. The real willingness of the State to enhance ADR seems dubious. Since 2008, governments have shown some disposition to introduce ADR in various fields of justice, but advertisements ended after the initial period and fell short of expectations. ADR arrived in Portugal in the context of an economic crisis and a crisis of justice, which could in some way justify the instability in the use of ADR mechanisms. However, the reduced costs for citizens and the State should be an argument in favour of flexibilization, but this does not seem to be enough to encourage governments to introduce a long term support plan to promote the use of ADR in labour disputes (Araújo & Brito, 2019).

In Turkey, individual mediation and conciliation do not exist in labour disputes and compulsory arbitration in individual labour disputes was enacted last year (Yilmaz & Yuzuak, 2018). Yilmaz and Yuzuak explain in this context:

¹⁵ Council of the European Union, Directive establishing a General Framework for Equal Treatment in Employment and Occupation, 2000/78/EC of 27 November 2000, OJ L 303/16, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0078&from=DE>>.

¹⁶ Martin E. Risak, ‘Austrian Practice in the Prevention and Amicable Settlement of Labour Disputes’, Annex I of the Conference Proceedings of the ILO conference on ‘Strengthening the Mechanisms of Labour Dispute Prevention and Amicable Resolution in the Western Balkan Countries and Moldova’ 25-26 February 2009, available at www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_168827.pdf, at p.44 and 47.

In Turkey, the ADR mechanisms in collective labour disputes were created as soon as collective labour rights were granted in 1960s. While arbitration for collective disputes has a long history, the arbitration in individual labour disputes has been codified first in 2012 as an option, which became compulsory in 2018 (Yilmaz & Yuzuak, 2019).

Legislative changes that have made ADR mandatory are criticized in Turkey by social partners including worker and employer organizations and lawyers engaged in ADR. Yilmaz and Yuzuak thereby recommend that

the decision of making the ADR in individual labour conflicts obligatory should be revisited. Keeping the ADR voluntary may create less problems” (Yilmaz & Yuzuak, 2019).

One of the reasons that they list for this, amongst others, is that an obligation is contradictory to the ethos of the ADR mechanism; and the draft does not oblige the arbitrator to properly inform the worker about his/her rights and entitlements according to the Labour Law (Yilmaz & Yuzuak, 2019).

Our analysis illustrates that within the countries studied, especially in the Netherlands and the UK, ADR in individual labour disputes is gaining increasing prominence. At the same time, it should be stressed that the reality is heterogeneous, reflecting different (historical) traditions and countries’ specificities.

Overall, all countries studied, except for Turkey and Hungary,¹⁷ adopted arrangements for mediation and conciliation in individual labour disputes. In Portugal, the Netherlands, Austria and the UK, mediation in individual disputes usually takes the traditional form, whereby the third party hears both sides (e.g. the employer and employee) and seeks to find an acceptable resolution before issuing a non-binding decision or recommendation, usually in writing.

With regard to arbitration, little detail is provided on arbitration in the national reports for labour disputes. One explanation thereof could be that arbitration is used as a last resort (also due to its costs), whereas conciliation and mediation are forms of ADR that are used at an earlier stage. Turkey is an exception to this, which illustrates the way forms of compulsory arbitration in individual labour disputes operate in practice.

The following tables 4, 5 and 6 represent for each national report how mediation, conciliation and arbitration are regulated in the respective legal systems. Table 7 and 8 give a comparative overview of the popularity (table 7) and attitudes of social partners, key actors and governments towards ADR in labour disputes (table 8) within each country studied. The empirical data suggest that in most ETHOS countries, attitudes towards ADR are in general positive, with some nuances that need to be addressed, which will be further analysed in detail in section 6 of part III of this report through the lens of five dimensions of proximity justice: geography, time and costs, visibility and culture.

¹⁷ As mentioned before in tables 3-6, in Hungary the Labour Mediation Service has no competence in solving individual labour disputes, only collective ones. In Turkey, conciliation and mediation do not exist with regard to labour disputes.

Mediation	The Netherlands (Safradin, 2019)	Austria (Vivona, 2019)	UK (Kirk <i>et. al.</i> , 2019)	Hungary (Árendás, 2019)	Portugal (Araújo & Brito, 2019)	Turkey (Yilmaz & Yuzuak, 2019)
	<p>Under Dutch law, before and during legal proceedings parties may opt for mediation either upon their own initiative or upon referral by a judge or any other person or institution. The parties themselves appoint the mediator and the process is completely voluntary. There are no statutory provisions that regulate the appointment of mediators. In fact, the Dutch system does not have a specific legal framework for mediation and hence no statutory provisions that mandate or regulate mediations. There is moreover no statutory governmental organisation offering mediation services in individual labour disputes. As such, the mediation practice is privately established.</p>	<p>In Austria, labour law conflicts, either between employer and employee or among employees, can be solved through civil law mediation. The act as such is not enforceable. To become enforceable, a settlement must be confirmed with an enforceable notarial instrument or the parties may ask an Arbitral Tribunal. The Austrian Civil Law Mediation Act was created to offer a standardized regulation to the institute of mediation. The Act defines mediation as „a voluntary activity of the parties, in which qualified and neutral mediators, using recognized methods, systematically promote dialogue between the parties with the aim to aid them in developing an own solution to the dispute” The institute of mediation is thus characterized by its voluntary nature and, as a matter of principle, cannot be conducted against the will of one of the parties. One exception has been created in the field of labour law and refers to Vocational Training Mediation (<i>Lehrlingsmediation</i>), in which the trainer is forced to mediate if he/she wishes to unilaterally terminate the contract with the trainee.</p>	<p>In 2008/2013 and 2010 Acas published Codes of practice on mediation in collaboration with representatives of British employers and trade unions, respectively. Both codes defined mediation as a process where ‘an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement. Any agreement comes from those in dispute, not from the mediator. The mediator is not there to judge, to say one person is right and the other wrong, or to tell those involved in the mediation what they should do. The mediator is in charge of the process of seeking to resolve the problem but not the outcome.’</p>	<p>According to the national report, there are no individual labour disputes in Hungary: the Labour Mediation Service has no competence in solving individual disputes.</p>	<p>In Portugal, a public service of labour mediation is available. Employers or employees can make a demand for mediation through the website, by phone, email or postal application. Then, the LMS (Labour Mediation System) will access the consent of both parts to join the mediation. If both accept, the localization of the employer and the employee is identified. After that, LMS nominate a mediator from the region of the parties and defines a place. Mediation is conducted in a meeting room in facilities belonging to public and private entities, most of those rooms are provided by municipalities. The time and date are scheduled by the parties and the mediator. All the process is voluntary and at any moment one of the parts can end the mediation. There are also private offices providing mediation services.</p>	<p>In Turkey there is no mediation in individual labour disputes.</p>

Table 4 | Conciliation landscape

Conciliation	The Netherlands (Safradin, 2019)	Austria (Vivona, 2019)	UK (Kirk <i>et. al.</i> , 2019)	Hungary (Árendás, 2019)	Portugal (Araújo & Brito, 2019)	Turkey (Yilmaz & Yuzuak, 2019)
	<p>In the Netherlands, mediation is used as a synonym for conciliation, since in essence both processes are facilitated by a third party. One difference that is raised within academics is that the conciliator is less active and directing than a mediator. Where a mediator provides the parties with a resolution on the ground of his/her expertise, a conciliator provides the parties with more clear and unambiguous information. As such, the process of conciliation is also perceived as ‘facilitated negotiation’. The ultimate objective of the conciliator is to clarify any misunderstandings between the parties that form the subject of the dispute.</p>	<p>An obligatory conciliation in cases of discrimination of people with disabilities was introduced in the course of the implementation of the EU Directive on Equal Treatment in Employment and Occupation. Art. 14 of the Federal Law on the Equality of Persons with Disabilities (<i>Bundes-Behindertengleichstellung gesetz</i>) foresees conciliation as an obligatory step before starting a court proceeding for cases of discrimination covered by the Federal Law as well as for cases listed in Art. 7 a-q of the Disability Employment Act. The idea of the legislator was to offer an easily accessible instrument to fight discrimination as well as keeping the number of cases before court as low as possible.</p>	<p>Consistent with prevailing conceptualisations of ADR as a mechanism to reduce the number of cases decided by the courts, Acas primarily evaluates the success of its conciliation service in terms of the proportion of settlements reached as a result of its intervention (see above). However, its website presents Early Conciliation as a ‘better way to resolve workplace disputes’ overall, suggesting a normative value that goes beyond the narrow aim of reducing public expenditures.</p>	<p>According to the national report, there are no individual labour disputes in Hungary: The Labour Mediation Service has no competence in solving individual disputes.</p>	<p>In Portugal, labour conciliation is informally promoted by the Public Prosecutor’s Office which is identified by workers, unions and their lawyers as the competent authority to solve their problem. Conciliation made through the Public Ministry consists in a negotiation assisted by a conciliator nominated by the General Direction of Employment and Labour Relations (GDLR) which, respecting the autonomy of the parts and through recommendations, suggestions and orientations, help the parts to find an understanding to solve the conflict. If an agreement is not possible through conciliation, the process follows is to court and then, Public Prosecution Office appears as a guarantor of worker’s rights and represent them in court. This procedure is costless for the worker; therefore, it is common that trade unions and lawyers in a general way prefer this solution instead of using Labour Mediation Services (LMS). Not only there is still the possibility of an (informal) conciliation outside the court but also, the workers feel more protected if the employer is unwilling to reach an agreement.</p>	<p>Turkey is a particular case in which there is no conciliation in labour disputes. As explained, arbitration is commonly used to solve collective dispute and for individual disputes it became compulsory in 2018.</p>

Arbitration	The Netherlands (Safradin 2019)	Austria (Vivona 2019)	UK (Kirk <i>et. al.</i> , 2019)	Hungary (Arendas, 2019)	Portugal (Araújo & Brito, 2019)	Turkey (Yilmaz & Yuzuak, 2019)
	<p>Arbitration is regulated in the Dutch Arbitration Act, which is codified in Articles 1022-1077 of the Dutch Code of Civil Procedure (hereafter: CCP). The majority of provisions is applicable within the Netherlands, with only a few provisions that are applicable to arbitration outside the Netherlands. These provisions mostly have a regulatory character, albeit some with mandatory provisions. On 1 January 2015, the new Arbitration Act has entered into force in the Netherlands. The present Arbitration Act dates from 1 December 1986 and is already 28 years old.</p>	<p>Regarding arbitration agreements stemming from labour law contracts, it is possible to enter such an agreement for already existing disputes: therefore according to § 9 (2) of the Federal Act on the Labour and Social Courts (ASGG) for all contracts defined in § 50 (1) ASGG (e.g. about the employment relationship between employer and employee) any arbitration agreement stipulated for future cases is void, unless it is stipulated for the executive director or the board members of a corporation. Also arbitration agreements stipulated for disputes arising from company statutes (<i>betriebsverfassungsrechtliche Streitigkeiten</i>), such as disputes arising from a collective contract, are void</p> <p>It might be worth mentioning at this point that the AK covers the costs of courts proceedings. They do not do so for the costs of arbitration: [...] the number of labour law cases that end before an arbitration tribunal is rather low</p>	<p>The last form of Acas intervention in individual disputes is an arbitration service for cases of unfair dismissal and flexible working time, where an inquisitory arbitrator is expected to reach a quick decision based on general principles of fairness rather than legal rules.</p>	<p>According to the national report, there are no individual labour disputes in Hungary: the Labour Mediation Service has no competence in solving individual disputes.</p>	<p>In the presentation, ADR is defined as voluntary, and established in the Portuguese legal order in 1986, through the Law nº31/86, of 29 August. This law defines that all litigation can be submitted by parties to the decision of arbitrators, under the arbitration convention, provided that is not submitted exclusively to courts or disputes related to unavailable right (Article 1 (1)). There are two types of arbitration agreement, 1) arbitral commitment - when the arbitration agreement has for object a current dispute even if affected to a court of law and 2) arbitration clause – when is about potential future disputes that arise from a contractual or non-contractual legal relationship</p>	<p>The Turkish judicial system incorporated the optional arbitration for individual labour disputes in 2012 (The Republic of Turkey, 2012b). The legislative intent behind the introduction of optional arbitration is to end individual labour disputes by the litigants, thus contribute to social peace, to promote arbitration with the objective of decreasing the workload of courts, and to enable simpler and easier solutions to conflicts without harming the absolute sovereignty of state's jurisdiction (The Grand National Assembly of Turkey, 2012).</p>

Table 6 | ADR Popularity by country

	The Netherlands (Safradin, 2019)	Austria (Vivona, 2019)	UK (Kirk <i>et. al.</i> , 2019)	Hungary (Arendas, 2019)	Portugal (Araújo & Brito, 2019)	Turkey (Yilmaz & Yuzuak, 2019)
Popularity	<p>The significance of out-of-court dispute resolution has increased since the 80's and its popularity is still growing in the Netherlands. The demand for the extension of these forms of ADR into the legal system is becoming more urgent and has also been advocated numerous times by the Dutch government. Extrajudicial solutions that the parties themselves bring about often lead to more satisfactory outcomes and are better complied with in practice. Such solutions, possibly with the help of, for example, a mediator, are therefore to be preferred. According to the NMI surveys as conducted within the Netherlands, 206 out of the 345 mediations registered since 1999 have resulted in a settlement agreement, which confirms a settlement rate of almost 60%. These figures apply to modern mediation.</p>	<p>Lacking any detailed statistics for most of the employed ADR mechanisms (beside the case of conciliation which is obligatory and for which statistics are available), it is difficult to make any definitive statement about the extent to which ADR mechanisms are definitively successfully employed. From an analysis of the statements made by the interviewees, however, it appears that mediation and pre-processual correspondence are indeed successful in solving conflicts. While [...] arbitration is not really applied in practice.</p>	<p>With the continuous decline of union representation and the introduction of legal incentives for workers to resolve individual employment disputes without resorting to the courts, ADR is gaining increasing prominence in the British landscape of industrial relations. Data on the prevalence of mediation in British workplaces is scarce but suggests that uptake remains low. Since the 1970s, Acas has been at the forefront of non-judicial dispute resolution in British labour relations. Initially focused on collective conflicts, the organisation has adapted to the decline of unions and the rise of Employment Tribunal claims by deploying a range of services tailored to individual disputes.</p>	<p>[this information concerns only collective ADR] Despite of the rules of cost exemption and cost advancement, the number of labour law cases sharply dropped after the new Labour Code was introduced. It may be argued that the very poor remedial system discourages especially employees to seek for justice, even in cases of (alleged) unfair dismissal. One of the reoccurring aims of judicial reforms is to shorten the duration of litigation; however, in case of labour law cases it has not been achieved by progressive procedural reforms, but through the reduction of number of incoming cases by making it pointless to turning to the court. Compared to 2010 when the former Labour Code was in force the number of labour law cases dropped by roughly 50 per cent. The number of crimination cases has been also sharply decreased overall in the country, but also at major regional courts.</p>	<p>After the aggregation of the Alternative Dispute Resolution Office to the DGJP, official justice statistics are under the jurisdiction of the National Statistics Institute which is still, at the time of this report, collecting data on ADR procedures. Nonetheless, from the scarce data available we can identify that Portugal has a low demand for public mediation services. The demands have been decreasing since 2008, probably due to the lack of publicity. Mediation for familiar disputes is more popular and have more demands because legislation provides that before going to court, families should try to solve the dispute through mediation. The same does not apply for labour disputes.</p>	<p>The use of the arbitration has remained limited in numbers until 2016 with only 3,336 applications to arbitrators (Çakır, 2016) among which 89 per cent of all applications were related to worker-employer disputes and 93 per cent of these disputes were solved. The 2017 Law of Labour Courts, which came into effect in 2018, made arbitration obligatory for individual labour disputes on reimbursements, compensations, and debt between employer and worker. This new regulation has made the arbitration a prominent feature of the ADR in individual labour conflicts in Turkey, which substantially increased the number of applications to arbitration.</p>

Table 7 | Attitudes of governments, private actors and social partners towards ADR

Country	Growing ADR support	Neutral stance towards ADR or negative stance
<p>The Netherlands (Safradin 2019)</p>	<p>Since 1995, the Dutch government has articulated its interest in the possibilities of mediation, as an alternative or complementary to civil litigation. The Ministry of Justice adopted various mediation experiments in- and outside the courts, but no projects were established that dealt specifically with mediation in labour conflicts. A special national mediation office was established to promote court-annexed mediation. Since 1 April 2007 all district courts and appeal courts have installed so-called special mediation sections, which examine cases on their suitability for referral to mediation. Dutch law as it stands today does not have a statutory organisation in place that provides mediation services in individual labour disputes. However the Dutch government is in favour of ADR, which can for example be proven by the various experiments that were initiated by the Dutch government and the adoption of mediation sections in the district Courts in 2007. In 2018, the Dutch Government aimed to introduce policy measures to increase the so-called ‘self-solving’ capacity of citizens and to decrease the workload of courts.</p>	<p>Social Partners have a neutral stance when it comes to ADR. Some representatives of the social partners at central level, and academics have pinpointed that the Netherlands do not need a settlement agency for collective dispute resolution since strikes do not occur that often. Particularly, employers organizations and trade unions are inclined to adopt a strategy of conflict avoidance, which can also explain the absence of a permanent settlement agency in labour disputes.</p>
<p>Austria (Vivona 2019)</p>	<p>The overall view of the Austrian government regarding ADR is that the system as it stands, with its instruments, is working. Therefore there is no need to extend it. The government’s main interest seems to be centered around the idea to avoid court proceedings, as mentioned in the explanations (Erläuterungen) to the laws concerning ADR. Or “pleasing” the industry in case of Vocational Training Mediation (<i>Lehrlingsmediation</i>): in this area, the industry wishes to retain the possibility to let the trainee go if the relationship did not function. In practice, mediation rarely ends up with unilaterally firing trainees. For what concerns the social parties, the cooperation works very well: they have their informal mediation to solve everything that can be solved outside courts and they make full use of it in the interests of their clients.</p>	<p>The obligatory element of the mediation in vocational training termination can be considered a peculiarity of the Austrian legal system in which mediation is characterized by its voluntary nature.</p>
<p>UK (Kirk <i>et al.</i> 2019)</p>	<p>More demand on ADR; introduction of legal incentives for workers to resolve individual employment disputes without resorting to the courts; most prominent example is the conciliation service offered by Acas to all workers wishing to lodge a claim in Employment Tribunals. Acas interventions are mainly designed to address</p>	

	<p>individual rather than collective disputes. This individualising approach, which also permeates the academic ADR literature consulted, can be understood as part of a broader shift toward the de-collectivisation of employment relations, itself partly stemming from legal restrictions on union activities</p>	
<p>Hungary (Arendas, 2019)</p>	<p>Labour Advisory and Dispute Resolution Service (<i>Munkaügyi Tanácsadó és Vitarendező Szolgálat</i>, MTVSZ) is a form of alternative dispute resolution which deals with collective interest disputes between employers and employees' representatives. MTVSZ seeks to facilitate communication between parties and to help them to conclude a mutually satisfactory agreement before dispute arises. The Service has no competence in solving individual disputes.</p>	<p>In general, court process is seen as expensive, slow and insecure, and as such ADR seems to be welcoming on paper. At the same time, the government does not advocate for ADR in individual labour disputes.</p>
<p>Portugal (Araújo & Brito, 2019)</p>	<p>In 2006, a protocol was signed by all parties (i.e. between the Ministry of Justice and the Confederation of Portuguese Industry, the Confederation of Portuguese Commerce and Services, the Confederation of Portuguese Farmers, the Confederation of Portuguese Tourism, General Confederation of the Portuguese Workers – National Inter-Union and the General Union of Workers) establishing a labour mediation service. Since its creation more than 80 entities comply with this form of mediation, namely professional association, employer entities and trade unions. However, the experience of mediators and state officials responsible for the management of the public services of ADR identify a decrease in the support of those mechanisms.</p> <hr/>	<p>In Portugal, the attitude of the government, private actors and social partners seems to be mixed. In one hand, government and trade unions has signed (2006) the protocol to enhance ADR mechanisms but on another hand, confidence on ADR seems to have lost strength. Similar to what happens with the Family Mediation System (Araújo, 2014), the LMS also suffers from the lack of knowledge of citizens and the judicial system. The discontinuity in the advertisement of ADR services, which is practically absent since the initial campaigns, is reflected in a discouragement on the part of the mediators willing to bet professionally and personally in this area, but who do not see positive feedback. The informalization of the resolution of labour disputes not only need more publicity but also an investment in legislation and in the institutions, who provide such services. However, only government/legislative pressure is insufficient, service providers must also make an auto-reflexion and evaluate critically the services provided in order to adapt theoretical models to reality.</p>
<p>Turkey (Yilmaz & Yuzuak, 2019)</p>	<p>The Turkish Labour Law only mentions alternative dispute resolution in the form of formal arbitration. Conciliation and mediation do not exist with regard to labour disputes. As the new law made the labour arbitration obligatory, applications increased drastically. The official statistics show that between 2 January 2018 and 27 April 2018, 127,845 cases were appointed to arbitration, and 38,667 were resolved in arbitration while 20,510 were carried to the courts (The Department for Arbitration, 2018).</p>	<p>Neither social partners including both worker and employer organisations nor the lawyers engaged in the public debate on the ADR are against the practice as long as it is voluntary.</p>

6. ADR and access to labour justice

When we evaluate the relevance and success of dispute resolution mechanisms, simple results cannot be expected, nor a one-size-fits all that delineates the way ahead. Judicial courts face different problems in different contexts and reforms must take that into account. Good practices may be used as leading examples but when exported with no consideration for local specificities and challenges, outcomes usually fail to meet the goals. In the same way, when we look at ADR mechanisms, the analysis is complex. As became clear in the previous sections, the concept includes a high variety of models and its popularity level across countries is variable. Also, good practices and good results coexist with bad practices and bad results, sometimes within the same institutions. In the next sections we will focus on advantages and disadvantages of ADR in labour disputes, taking into account good and bad practices, favourable arguments and criticism that appear across the six national reports. Differently from the previous section, the aim here is not to present a comparison between countries, but to provide for an empirically grounded analysis of the leading question, i.e. in the context of high unemployment rates, of the dismantling of welfare state and of the attacks on collective bargaining, are individual ADR mechanisms useful tools for accessing justice and claiming labour rights? Considering that aim, the national reports' data, results and arguments are discussed in light of the concerns about ADR and access to proximity justice presented in the third section of this report.

6.1 Five dimensions of proximity: are labour ADR mechanisms closer to citizens than judicial courts?

As we already discussed in the third section of the report (i.e. part I), judicial justice tends to be a strange and distant world for common citizens. We identified five dimensions of the variable of proximity: geography, costs, time, culture and visibility to assess this hypothesis. Judicial courts are, more often than not, expensive, time consuming and opaque. ADR mechanisms are usually less expensive, faster and geographically closer to citizens. Lawyers, judges and other legal professionals share a common language whereas ADR mechanisms tend to use a language that the ordinary citizen understands. In addition, formal legal proceedings can be complicated and confusing, while informal ones are more familiar and easier to figure out. The variable of visibility is a further challenge, as it is not always clear that informal justice in the European context is likely to be identified as a relevant option to claim rights and struggle for justice. In fact, ADR's evaluation must carefully address the four dimensions of the variables. In this section we want to understand to what extent labour ADR can be effectively closer to citizens and whether there are risks, which prove that proximity is mainly wishful thinking that is not reflected in practice (i.e. law in action). The following subsections focus on the variables of proximity through the lens of the national reports.

6.1.1. Geography

In the countries addressed by this research, geography appears to be a non-relevant variable to compare ADR and the courts' accessibility. Despite the fact that there might exist a bias resulting from a focus in urban areas, key informants and documents tend to disregard the question of physical distance. We are not suggesting that this issue should be ignored, but, instead, that geographical distance seems not to be a main obstacle to access justice and ADR mechanisms are not necessarily a better option considering this variable. However, the possibility of initiating a claim from home is certainly an advantage in terms of access to justice. As stated in the Dutch report "the internet is increasingly offering tools for people who want to solve their problems themselves" (Safradin, 2019). This happens not only with ODR, but by using the internet to promote proximity in addition to the traditional forms of ADR. See box 1 and box 2.

Box 1 | ADR and online resources - Netherlands

Extrajudicial forms of dispute resolution have in common that one or more third parties, not being a government judge, are competent to assist in solving the dispute from a neutral and impartial position.¹⁸ All these three forms are offered both offline and online. The online variant is also known as online dispute resolution (ODR). In addition, ODR includes all forms of online self-help. The internet is increasingly offering tools for people who want to solve their problems themselves. Examples thereof in the Netherlands within the labour context are *magontslag.nl* and more general *Justice42.nl*.¹⁹

Safradin (2019)

Box 2 | ADR and online resources – Portugal report

The employer and the employee who have a dispute can submit the dispute to mediation by using a blue number 808 26 2000 (local call cost) or by means of an application for online mediation.

Araújo & Brito (2019)

6.1.2. Time and costs

As opposed to geography, empirical evidence shows that costs and time are two dimensions of proximity in which ADR tends to present clear cross countries advantages compared to courts. Boxes 3 to 8 are a collection of excerpts that address this question from different angles and paces. Reports of Austria and Netherlands are very optimistic concerning this question (see boxes 3 and 4). The authors of the UK report, though very critical of individual ADR, recognize that Acas is quick and cheap (see box 5). Public labour mediation in Portugal, though not very popular, shares the same characteristics being only beaten by the informal conciliation promoted by the Public Minister that is fast and free of costs (see box 6). In Turkey, after being introduced an optional labour arbitration in 2012, a new law made it mandatory on basis of the idea that it is, among other advantages, an easier, simpler and cheaper way for conflict resolution (see box 7). In Hungary, where ADR in labour disputes are only collective, it is suggested that the use of out-of-court dispute resolution could provide a more cost-efficient service (see box 8).

Box 3 | Time and costs – Austria report

Overall, it can be said that ADR mechanisms indeed are faster than civil litigation, irrespective of the type of the ADR mechanism employed:

A lot faster. It is solved in days or weeks. (...) Normally, if we work hard, if he wants, than it often takes a couple of days. Until the case comes in and it is solved in one or two weeks. Maybe you still need two weeks until it is formally written, until everybody has the settlement and everything is ready, but that doesn't take much time.

¹⁸ Brief Tweede Kamer Naar een maatschappelijk effectievere rechtspraak [Letter Second Chamber: towards a socially effective administration of justice], 20 April 2018.

¹⁹ See to this extent: <https://www.magontslag.nl/info/page/ontstaanendoel>

So generally it has to be completed in a couple of weeks and before a court that never happens. It already takes a couple of weeks in order to get an appointment at court. The real meetings take a lot of hours, more than before a court. It takes more hours than before court but the period of time in general is shorter (ATD6.5.02).

[...]

Overall ADR mechanisms are praised for their lower costs: there are indeed many financial incentives either offered by the institutions of social partnership to their respective members or provided by law which make the use of the ADR mechanism financially more attractive:

It does point in the direction of trying not to be obliged to overcome the obstacle of going to court; trying to find solutions in advance because as soon as you are before a court, legal costs arise. Therefore, it constitutes a low-threshold access in order to find a solution – like mediation (ATD6.5.06).

The interviewed representative of the Chamber of Commerce highlights also the “indirect” costs that are connected with judicial proceeding for a company:

You can't say that, because you don't know how the court would have decided. But you can't tell them that but if you consider the costs of a lawyer, the costs of a colleague who has to state something in court, which also harms the company; if you consider all that, the trouble you have, the written forms. You always have to stay in touch etc. (ATD6.5.02).

Vivona (2019)

Box 4 | Costs – Netherlands report

While civil litigation and arbitration are long and costly processes, the duration of (labour) mediation is often many times shorter and cheaper. All interviewees have, in one-way another, argued that ADR mechanisms constitute a lower cost and are a more subsidiary form of dispute resolution than civil litigation.

In fact, in one of the interviews, a key actor specialized in ADR argued that the overburdened court system is having an adverse impact on the sense of procedural justice of citizens:

I myself have been a citizen in a civil procedure a few times. This is partly anecdotal, but it concerned an administrative law case. [...] What I encountered is that you enter the courtroom, the session is planned and you come in. The judge enters, and even before he/she says something to you as a person seeking justice, he/she stipulates: "Madam [x], you probably already understand what my judgment will be. Even apart from the content and maybe the judge had a point, but especially when it comes to whether people feel that they are being heard and that justice is being served: even though you may not have gotten your right, you still want to feel treated justly. So even before the judge was seated, it was "you know what my judgment will be". And then you think from your viewpoint as a professional and lawyer: well ... how would I do that? And this all may have to do with the fact that a judge may have too many cases on his/her desk and that he/she must ensure that he/she can get as much as done as possible. So you have to keep up, but yes when you talk about justice, and the idea that people can live with the verdict, even if they have not been right, this is really disappointing. [...] It is at the expense of, I think, the pursuit of justice. And if you want the rule of law to function, well, then people must also have a certain confidence in the rule of law. And that is of course under increasing pressure.

[...]

Justice would in any case entail for me that you have the certainty that the third party, and that does not necessarily have to be the mediator, or the judge, but the role of that third party is important and

assuming that there is a conflict in which you think someone has done something for you, that you know for sure that enough time has been spent on the matter, and that indeed the arguments you have put forward, that they have actually been discussed. [...] And I think that there really is an opportunity for mediation, because in the end the duration is much shorter and much more attention has been paid to the parties involved. (NL D6.5.06)

General advantages and disadvantages of mediation as formulated by the key actors interviewed

Mediation can offer a quick and effective solution	Voluntary (parties cannot be obliged to enter into mediation)
Bespoke solution in which parties remain in control over the case	Not every mediation succeeds (completely). With civil litigation there is always a judgment
Relatively cheap compared to civil litigation. The average mediation meetings constitute 1.5 to 3 hours. In business conflicts there are on average three meetings of 2.5 to 3 hours, in mediations between government bodies and citizens the average contact time is usually no more than 2 to 3 hours divided into one or two meetings.	Lack of centrally arranged quality standards for mediators
The position of the neutral mediator (not above but between parties)	The difficulty to strike a balance between assistance of parties (for which there is a demand) and the self-solving capacity of citizens
Mediation prevents legalization of the conflict.	Unwilling parties can abuse mediation, because they can gather information that they would otherwise not have obtained in the area of confidentiality,
The (employment) relationship between the parties will be maintained or will be terminated decently	Unwilling parties can use mediation as a delaying tactic

Safradin (2019)

Box 5 | Time and costs – UK report

This service [Acas] normally intervenes rapidly, entails no direct financial cost for parties and seems to be positively evaluated by most of its users as well as (other) employers.

Kirk *et. al.* (2019)

Box 6 | Time and costs – Portugal report

At the official webpage of the Directorate-General for Justice Policy (DGPJ),²⁰ labour mediation offers a group of advantages that include confidentiality, safety, informality, efficiency, quickness and low costs. The cost of the Labour Mediation Service is of 50€ for each party, independently of the number of reunions made during the mediation process. If one or both of the party have judicial aid, the payment is not mandatory. Labour mediation have a time limit of 3 months to reach an agreement. The average time of a LMS process is of 28 days.²¹

Araújo & Brito (2019)

Box 7 | Time and costs –Turkey report

The Turkish judicial system incorporated the optional arbitration for individual labour disputes in 2012 (The Republic of Turkey, 2012b). The legislative intent behind the introduction of optional arbitration is to end individual labour disputes by the litigants, thus contribute to social peace, to promote arbitration with the objective of decreasing the workload of courts, and to enable simpler and easier solutions to conflicts without harming the absolute sovereignty of state’s jurisdiction (The Grand National Assembly of Turkey, 2012).

[...]

Due to the high workload of courts, long-lasting court process and high court expenses, by 2017 Law, arbitration became an obligation that litigants must go through before filing a case in labour courts. It is stated in the legislative intent of the law that arbitration is an easier, simpler and cheaper way for conflict resolution and it creates a win-win situation contrary to court rulings which result in the loss of one litigant (The Grand National Assembly of Turkey, 2017).

Yilmaz & Yuzuak (2019)

Box 8 | Time and costs – Hungary report

In order to increase access to justice it would be necessary either to establish out-of-court dispute resolution body specialised on individual labour law cases, which could provide its service on a more cost-efficient way, thus parties could turn to this body to resolve conflicts before they terminate a labour contract; or the competence of the existing MVT SZ could be expanded to cover individual cases.

Árendás (2019)

Previous reports within Work Package 6 demonstrated that the crisis and the “one size fits all” character of austerity did not hit everyone in the same way. Besides the reinforcement of inequalities between countries, the gap between the lower-paid and the higher-paid jobs deepened. Furthermore, the distance between the insiders with permanent work and social protection and those in precarious jobs and limited social protection increased. Some social groups were more affected than others by the crisis and the austerity measures such as women, young people and immigrants, already typically in a disadvantageous situation in the labour market and in the economy (Meneses *et. al.*, 2018). The European Social Model (ESM) that was being threatened for some time under the influence of neoliberal theories and the debate on sustainability is significantly affected as a result of the crisis. Neoliberal

²⁰ In portuguese – “Direção Geral de Política de Justiça” or DGPJ

²¹ Labour mediation campaign, available at http://www.dgpj.mj.pt/sections/gral/campanhas-sobre/campanhas-anexos/folheto-mediacao-laboral/downloadFile/file/SML_Folheto.pdf?nocache=1350657681.32

policies affect trade unions' strength with some authors arguing that a new subjectivity based on individuality is being created and the erosion of ESM affects social dialogue structures.²² Collective struggles are under attack and unions are facing strong pressures, which challenge their strength (Araújo and Meneses, 2018). This reality transforms a large amount of citizens into a very vulnerable working mass that is willing to accept almost anything in order to have a job and can hardly rely on collective forms of social protection and struggle.

Under these circumstances, litigation costs became a highly relevant dimension to the workers. The UK and Netherlands reports address specifically this question by arguing that unions' financial limitations incline them toward lower cost solutions; as happens with workers when they have no insurance schemes to cover litigation costs and are not unionized (Kirk *et al.*, 2019; Safradin, 2019). None of the national reports argues that ADR should replace collective forms of struggle. Low costs of litigation through ADR are beneficial if they do not result in a second-class justice and reinforcement of vulnerability. This will be discussed throughout the following sections.

Box 9 | Crisis, austerity and individual ADR costs - Netherlands Report

The added value of mediation in individual labour disputes seems to be increasing in the Netherlands, although this cannot be fully supported by statistical data. As argued by scholar de Roo (2010), for employers, the tightened employment market and the austerity measures taken in the wake of it provided an incentive to negotiate with employees. For trade unions on the other hand, financial limitations provide a driving force to look at mediation as an alternative for trade union supported court proceedings. In addition, the rising costs of the national social insurance schemes have led employers and employees to attempt solving underlying disputes first, before resorting to the insuring scheme since this is a cheaper way of dispute resolution. At the same time, de Roo argues that "it is hard to predict what consequences – negative or positive - the economic recession will have on the practice of mediation in individual labour disputes. Some experts expect that the recession will increasingly necessitate employees to go to court since there is little room for negotiation (inter alia through mediation), while others believe that exactly the economic recession may boost mediation."

Safradin (2019)

Box 10 | Decline of union representation and individual ADR - UK Report

With the continuous decline of union representation and the introduction of legal incentives for workers to resolve individual employment disputes without resorting to the courts, ADR is gaining increasing prominence in the British landscape of industrial relations. The most important sign and motor of this change has been the conciliation service offered by Acas to all workers wishing to lodge a claim in Employment Tribunals.

Kirk *et al.* (2019)

Slow justice is usually harmful to both parts but might be more expensive for the weaker party, usually the worker. In box 11 we can read a discussion about how, under some circumstances, the strongest party may benefit from time-consuming justice. However, it must be noticed once more that universal one-size-fits-all solutions are not available on this subject. ADR in general, and specially mediation, require many times the discussion of latent conflicts and that may take time. As noted in the Austrian report whenever a tight timeframe is imposed on the parties, that is not necessarily conducive to a fruitful settlement of the dispute (Vivona, 2019)

²² For a discussion on this, see D6.4 (Araújo & Meneses, 2018).

In Portugal, the Directorate General for Justice Policy is currently engaged in a study on public labour mediation aiming to understand the reasons for the poor popularity of this mechanism. Among other things, the tendency for companies to refuse requests for mediation initiated by workers is being studied. In the interview with two of the study's responsible, this issue was discussed:

SA - By what I also understand from our conversation, although few in number, most requests for public mediation are made by workers. If there are so many denials, it means that companies tend to be barely open to mediation services. Has there been any attempt to explain this mistrust?

EV - There is a question we want our study to answer [...].

RP - I don't know if there is a strategy, but I would say it sometimes seems that it's good for the company, as it's usually beneficial, in all legal proceedings, for one party to drag on. And here too. Not accepting is good, why? Imagine that we're talking about holiday pay, we're talking about a litigation that has been going on for several years, where we're talking about several thousand euros...

EV - Indemnity, due to dismissal...

RP - It can make perfect sense for a company to repeatedly, as Emanuel was saying, drag on...

EV - This was a testimony we heard from a representative of an association of companies (PTD6.5.01).

Araújo & Brito (2019)

6.1.3. Culture

Cultural or human proximity is a crucial proximity dimension. The creation and development of dispute resolution forums that use common sense language and familiar routines, being at the same time trusted by citizens may reduce distance between litigants and justice institutions (see box 12).

Box 12 | Advantages of familiar language- Netherlands report

First of all, innovation of legal proceedings is necessary. The judiciary will have to adapt to the changing circumstances in order to keep meeting the needs of citizens and businesses: in this regard, simple and flexible procedures should be maintained, in which conflicts are not spearheading but are resolved sustainably, with a judge who quickly finds solutions or ADR mechanisms that are closer to citizens. In this context, language is highly important since ADR can make a difference for citizens when it comes to the use of so-called simple and understandable language, as opposed to the more difficult legal terms that are often applied in the civil litigation procedure. A representative of the Dutch Dispute Commission argues in this light the following:

I think that we score high on understandable language. At the front, in particular. The website is set up at B1 level, so we are using very short words, short sentences. We also try to do that as well as possible. And if a word is not easy to understand, then we also describe it with a description. A challenge that we absolutely have to strike, and what we are working on now, is our correspondence during the procedure. And the next step that we absolutely have to make, and which we are discussing a lot, is the procedure and the language in the judgments [arbitration and binding advice]. That should be focused on integrating about more empathy. Yes, it must remain legal, but at the same time with some more context

it may become more understandable for the ordinary citizen. There is a lot of tension there, but those are some points that we have to address [NLD6.5.5].

Safradin (2019)

However, assuming that ADRs always fit into this picture of familiarity and that citizens are invariably more comfortable with informal justice would be a romanticized vision of reality. Although the use of informal procedures and familiar language is intrinsic to ADR and tends to favour proximity between citizens and justice, questions are raised in light of the discussion presented in the first part of the present report. The first concerns the success of ADR in maintaining informal practices. As previously presented, many authors point to the risks of formal contamination through two kinds of movements: informal instances mimic formal, or formal procedures colonize informal forums. In both cases there are risks associated with the transformation of horizontal instances into court alike vertical forums without ensuring the type of guarantees associated to judicial justice.

In ADR, legal representation is usually not compulsory as the parties are expected to reach a decision by themselves with the help of a third party. However, if the parties are not familiar with procedures and not comfortable expressing themselves, informality may be translated into a repressive resolution. If one of the parts misses relevant legal information, it may feel compelled to accept an uncomfortable settlement. In cases of conciliation in which the third party has a more proactive role it is important to ensure that both parts understand that conciliator cannot impose a solution.

This topic is highly important in terms of proximity justice. Boxes 13 and 14 present testimonies of mediators who recognize the issue and identify their role to overcome it. In box 15 there is a very useful analysis to understand the risks at stake and how easy they may become real.

Box 13 | Mediator role to avoid imbalance of power – Austria report

Overall, interviewees consider ADR mechanisms to be closer to the citizens than court proceedings, because of their less formal character. However, ADR mechanisms presuppose the ability of the parties to engage in a dialogue with their counterparts; an ability that not all vulnerable people necessarily enjoy in their fullest:

In general, it is a task in mediation to support someone because there is always an imbalance. This means I am in the middle and if someone has troubles expressing themselves – some people speak ponderously or are not eloquent – it is my job, as an interpreter; I have this task. I am language wise..., well as far as my formation is concerned, I am a lawyer, and language in mediation is not legal language at all. In mediation language mustn't be a problem for you. People at court have these problems. But at court, what has to be said is that before court people have a legal representation who assumes this role. Of course, they don't understand what he/she is saying but he/she represents them at court and in mediation I have to make sure of that because they don't have a lawyer present. I have to make sure that I redress the imbalance; I also work... work with interpreters can be included too but a lot gets lost here (ATD6.5.05).

Vivona (2019)

Box 14 | Mediator role to avoid imbalance of power – Portugal report

There is no real inequality if the parties are truly aware of their rights and duties, in terms of expectations. For instance, right to end-of-contract compensation, if people already have an expectation of what is the maximum and minimum, they can negotiate, there is no such inequality. If you tell me “they're going to try to fool you” no, that doesn't exist. The mediator is there to somehow understand what is being done and, if he notices that such inequality exists, he will interrupt the mediation so that the person can consult a lawyer, go to Social Security to see if he is entitled to unemployment benefit, for instance (PTD6.5.04).

Araújo and Brito (2019)

Box 15 | Reinforcement of inequalities – UK report

In terms of awareness regarding the conciliation process, qualitative interviews revealed that ‘when submitting the Early Conciliation (EC) notification, claimants were unaware of what EC itself would involve. They generally had no expectations regarding the process and were unaware of any details as to what would follow once they entered the process. It was only after they were contacted by an ECSO [Early Conciliation Support Officer] that they became aware of next steps.’ In contrast, employers were more familiar with EC and had ‘a better sense of what to expect than claimants’ [...] - Significantly, some 30% of claimants who had accepted conciliation had done so based on the mistaken belief that it was compulsory before lodging their claim. This suggests that the optional nature of the scheme had not been made sufficiently clear to them.

[...]

The case studies show that despite portrayals of conciliation as an informal and accessible process, workers can experience it as complex and burdensome. Participants struggled to understand conciliators' limited role as ‘go-betweeners’ relaying employers' expectations and offers, especially when they had previously resorted to legal advice through the Acas helpline. Speaking to various Acas officials through multiple phone calls can also lead to unsatisfactory communication and confusion. The informal adviser of one participant felt he needed specialist help to deal with Acas. During conciliation, workers may feel pressured to settle by comments highlighting the weakness of their case or by reminders of judicial costs, including the unpredictable prospect of having to pay employer costs. While these issues are not necessarily raised directly by conciliators, it may be difficult for them to reassure claimants that cost orders are unlikely. One worker thus perceived Acas as uncritically conveying employer threats which she could not rationalise due to her lack of legal expertise. More subtly, conciliators can frame the dispute as a private issue best resolved amicably between parties and downplay the substantive difference between settlements and court decisions. One of these differences consists in confidentiality agreements which two participants were requested to sign, in one case leading [x] to doubt the possibility of acting as a witness in future complaints.

Kirk *et. al.* (2019)

Forms of payment to the third party must be considered on a global evaluation of ADR. They must not be able to influence professionals' behaviour. Boxes 16 and 17 stress the risks at stake when the employer is responsible for the payment of the third party. But shared litigation costs do not eliminate concerns. In the Portuguese case, for example, it might be problematic that the mediators of the Public System of Labour Mediation receive the same amount per mediation independently of the number of sessions. This may lead some to press the parts into an early agreement. However, if receiving by session they could be tempted to drag the process into unnecessary sessions.

The same kind of issues might be raised concerning evaluation of quality. As claimed in the box 17, the evaluation of an ADR or of its professionals' success through the number of well succeeded mediations or conciliations might be highly problematic. What appears to be certain is that straight universal recipes are difficult to find.

Box 16 | Payment of mediator fee and imbalance of power relations

The Netherlands does not contain statutory provisions for the payment of mediators. As such, the parties have the discretion to decide who pays the mediator. However, in practice, it is often the employer who pays the costs of the mediator/mediation. In the absence of specific models of Rules of Conduct in labour disputes, the NMI Mediation Rules are the ones that are of overriding interest. A problematic concern in this regard is the power imbalance between individual employees and their employer. This concern may become stronger if the employer pays the mediator's fee, which is often the practice, or when the mediator aims to conduct multiple mediations for one employer. In this regard, it is noteworthy to refer to the European Social Charter, which refers in Article 6(3) to the obligation of contracting Member States "to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes". When looking carefully at the wording of this recital, de Roo argues that the Dutch practice is acting in violation of the European Social Charter.

Two interviewed key actors specialized in labour ADR in the Netherlands stipulate the following on this matter:

Interviewee 2: In labour disputes we do very much see that it is usually the employer in individual labour disputes that ends up paying the mediation fees. That is difficult. If a certain mediator hopes for certain follow-up assignments, the mediator has an interest. For example, the judge has an interest in getting as many things as possible of his / her plate. He / she gets more salary if he/she handles more cases. (NL D6.5.06)

Interviewee 1: Quite a few mediators in the Netherlands are begging for more cases. And that could therefore lead to dependence on 1 of the parties [...]. That is different in the UK for example, where the mediator is paid by the government, in labour disputes at least. The UK ADR institution, AFAS, is not dependent on the UK government, they have a budget that is funded by the government. So in their functioning they are independent. It is a typical feature of labour disputes in the Netherlands that mediation is paid for by the employer in practice even though the idea is 50/50. The employer does not feel comfortable and as a mediator you can still have the some partiality, because you do want to have more cases. So there have been a few disciplinary cases, MFN (Mediator's Federation the Netherlands) has its own disciplinary court, which played a significant role in labour disputes and that also led to a best practice that they have formulated: 'it should not be the case that you choose the side of one party'... (NL D6.5.06)

Safradin (2019)

Box 17 | Reinforcement of inequalities – UK report

[T]he evaluation of ADR mechanisms according to the proportion of settlements reached creates a structural incentive for mediators to exact pressure on the party most likely to make concessions – that is, the weaker one (Busby & Morag McDermont, 2012) These incentives become even greater when they are paid by employers themselves, who may become familiar with different mediation services and reject those they deem least attuned to their interests (Budd & Colvin, op. cit: 471, 473). At the ideological level, the reproduction of power imbalances during the deliberative procedure is underwritten by the principle of mediator neutrality, difficult to reconcile with mediators taking a normative stance against the more powerful party (Mulcahy, 2001; Genn, op. cit.: 90; Busby & McDermont, 2012: 179-180). This means that employers may introduce mediators in the workplace to conceal the exercise of managerial power (Dolder, op. cit., 331-334). Mediators can seek to persuade plaintiffs to tone down their demands through a variety of tactics such as inviting them to look forward and ‘get over’ the dispute, highlighting the danger of not settling or the unpleasantness of trial (Genn, op. cit.: 112), stressing parties’ common interests, emphasising specific facts or values, discouraging the expression of negative emotions (Dolder, op. cit.: 331-334) and suggesting that it is morally wrong for workers to burden courts or employers (Rose and Busby, 2017). Recourse to ethically dubious tactics is facilitated by the private nature of deliberations which shields them from public scrutiny (Budd & Colvin, op. cit: 270). On the other hand, ADR has been commended for giving parties greater freedom to formulate their claims outside the confines of legal categories, thus enabling greater communication and participation (Stulberg, op. cit.: 933). For instance, ‘an employee who is dismissed after many years of loyal service may be motivated to bring suit in order to give voice to feelings that the employer has violated the employee’s trust, yet in litigation the case may need to be framed as an age discrimination case to provide a legal basis for the claim’ (Budd & Colvin, op. cit.: 472).

Kirk *et. al.* (2019)

It has by now become evident that proper training for professionals, strong ethical codes and regular evaluation of ADR appear to be crucial in order to get the best from ADR. Ensure that citizens have access to the required legal information appears to be another condition to not yield to the pressure of settling with an unfair solution they are uncomfortable with. ADR must not constitute a second-class justice, but a citizens’ choice when they offer a better solution. In case of being mandatory, such as in Turkey, there must be, as in a first instance court, the possibility of appeal.

6.1.4. Visibility

The idea of proximity must contemplate a fifth dimension, i.e. that of visibility (Araújo, 2014). In the context of what legal anthropology calls “forum shopping”, that is, when litigants can choose between different instances (Benda-Beckmann 1981), to a large extent, the success of ADR depends on being recognized by citizens as a problem-solving mechanism. Modern law and courts have long been present in European societies and, even though they have overlapped informal mechanisms, courts now occupy a large part of the imaginary of conflict resolution of citizens and legal operators themselves.

This variable dimension – with different formulations – is mentioned throughout the national reports (boxes 18 and 19). The Portuguese report discusses it more extensively as the absence of visibility of the public mediation system highlights its relevance to understand the success or failure of ADR to promote access to justice.

As was already illustrated in chapter 5, in Turkey the government solved the problem of lack of visibility of labour arbitration by making it compulsory since 2018. This change was not consensual and raised criticisms from workers' organizations (see box 20).

Box 18 | Visibility of ADR – Netherlands report

At the same time, even though mediation as a method for ADR is becoming more popular, not all citizens are aware that this method is open for them. A mediator and lawyer, specialized in labour disputes, argues the following on this matter:

More and more, it is getting more and more popular. It is by no means always known to people what it exactly means, what the role is and what is different than if you act as a lawyer. But it is becoming better known. Now people actually come even more through referrers. Through a lawyer who says go to a mediator or through a judge who says 'especially enter into mediation'. It does not come much from people themselves, because of unfamiliarity [NLD.6.5.7].

An interviewee within the academic field has also argued that raising awareness on the method of using ADR for citizens, is important:

I think the biggest problem is that they have no knowledge of what is there, a lot of citizens do not even know that there is ADR, and that ADR is an option for them, so the first step is already awareness. And besides, the traditional legal way, such as litigation is often far too expensive and not in proportion to the value of the claim they have against the company. Well it is very time consuming and very complex, especially in cross-border cases, if you are involved with other member states and a language that you do not speak... [NL D6.5.2].

Safradin (2019)

Box 19 | Lack of visibility as problem of Public Labour Mediation – Portugal report

The action of the Portuguese Labour Mediation Service (LMS) is almost non-existent. The number of requests is insignificant and the number of successful mediations is practically zero. There isn't necessarily a rejection of forms of settlement based on conciliation by citizens. These continue to adhere to the informal conciliation promoted by the Public Prosecutor's Office. In the presence of a labour dispute, workers and unions tend to seek out the Public Prosecution Service, which they identify as the competent authority to solve their problem. For this choice seem to count some factors: the Public Ministry is recognized as an authority capable of providing problems; informal reconciliation does not involve costs; the worker has access to legal information and, if no agreement is reached, the process will run, and will be represented by the mediator.

If forum shopping is possible, ADRs would need to be known and recognized as dispute resolution mechanisms, so that they can be used. Although there is information available on the functioning and advantages of LMS on the DGPJ website, lack of information is invariably identified as one of the main obstacles to its use and proper

functioning. The dissemination effort that took place in the first decade of the millennium, after the creation of public mediation services, had its results at the time. However, in recent years, despite the enthusiastic discourse of public mediation system operators and those responsible, dissemination has been virtually non-existent. Interviews point to the need for dissemination to citizens, training of legal professionals and articulation between courts and ADR. See below excerpts of interviews with a mediator and two state officials.

At the beginning of the GRAL, there was a lot of publicity, even on television, but that came to disappear and those people who were informed, right now it goes unnoticed. They don't see this as effectively an alternative tool for resolving disputes. This information runs a bit through the Ministry of Justice, but also through training. Training people, employers' associations, unions, to have a genuine sense that they can use this tool as a useful tool. Whether in prevention or in resolving labour disputes. It would be really interesting if employers' associations, and even trade unions, that constantly refer to the Authority for Labour Conditions (ACT) and the Ministry of Labour, when they have issues, could perceive that there are easier, faster, and more accessible ways than actually resorting to entities that advise them to go to court to resolve their disputes. The usual thing is, when a worker has a labour issue, this issue automatically passes through a Labour Court. First resorting to an Authority for Labour Conditions (ACT), or to an institution to try to know what his rights are and people say "to have your rights you have to go to court" (PTD6.5.03).

Interviewer - Could there be anything done by the DGPJ, or other state agencies, to encourage labour mediation?
Interviewee 1 - *Dissemination, dissemination, dissemination. It doesn't exist, it is very scant. I know something was done a few years ago and at that time there were some lawsuits, but I'm not aware that anything has been done in the last few years. Dissemination must also pass through the training of judicial officers in the area. Lawyers, realizing no one is stealing, taking jobs. Especially in the Public Prosecutor's Office, in terms of the judge, perceiving what mediation is. And I also think there should be intervention by the legislator. One of the things that has been done in family mediation, the law clearly states clearly that there's mediation, and there is an incentive that judges cannot advance to the case if they have more room to go to family mediation. This also goes for labour mediation. Before the conciliation they do, why not send them to mediation? It would make all the difference (PTD6.5.02).*

Interviewer - [...] *When creating a mediation service, the idea is for it be culturally close to the citizens, but then it seems that citizens have more confidence in the institution that represents the judiciary. It's just a hypothetical assumption I'm trying to raise to justify this demand of the Public Prosecution service. People, on the one hand, are afraid of the judiciary, they are afraid of the courts, but on the other hand they have no confidence in other institutions to solve the problems. I don't know how to explain this.*

Interviewee - *I can give you two notes, but we're just "mouthing off", we're just talking. It has no scientific validity. The first is that, nevertheless, from the perception I have of the ADR instances in Portugal, they don't really have a rooted history in Portuguese culture. In fact, there is legal and judicial pluralism, some alternative resolution, in other contexts, in the Portuguese context we don't have this culture per se. It is an imported reality that we're trying to promote and publicize. The second note, although the court appears in a logic of authority, in the labour context, from the point of view of the worker, it appears as a kind of guarantor of workers' rights. That is, there is the court in the strict sense, that is, the judge and then in a broad sense, which involves the judge and prosecutor. When the Public Prosecution Office appears, it appears as a guarantor of workers' rights. Now, as a guarantor of workers' rights, probably, and I'm just mouthing off, that is, coming up with some ideas, this representative probably, I would say, has a greater value than the lawyer himself. Because he's the representative*

and it's the representative that will accompany you if the conciliation goes wrong, he'll be his representative. I would say that in a labour-only context, because the Public Prosecutor appears here as a representative of the labour context as well as other disadvantaged such as minors and so on. In this context, it seems to me that this tool that we were talking about here, which was conciliation in the administrative procedure, can bring about this result and ends up being a figure different from the one that I was talking about, that is the court appearing as a power of authority. He does, in fact, appear as an authority, but he is a representative. The true power of authority, that is, the third impartial comes next, that is, the judge (PTD6.5.01).

Araújo e Brito (2019)

Box 20 | Compulsory labour arbitration – Turkey report

In Turkey, the ADR mechanisms in collective labour disputes were created as soon as collective labour rights were granted in 1960s. While arbitration for collective disputes has a long history, the arbitration in individual labour disputes has been codified first in 2012 as an option, which became compulsory in 2018.

Parallel to global trends, arbitration is presented as a quicker and cheaper way of solving labour disputes than the mainstream civil litigation. It is deemed to create win-win solutions between litigants who are presented as equals. For collective disputes, this assumption is more plausible as trade unions represent organized labour against the employer or an employer organisation. Trade unions are in a better place than individual workers in foreseeing the potential outcomes of arbitration processes. However, when it comes to individual labour disputes, this assumption hardly holds as individual workers may lack the necessary information to foresee the implications of arbitration especially compared to pursuing a civil litigation. This problem was originally acknowledged by the Turkish Labour Code, which is built upon the idea that workers constitute the weaker side of labour relations, thus should be protected by law. With the introduction of ADR in individual labour disputes, this essence of the labour code may be at stake.

Neither social partners including both worker and employer organisations nor the lawyers engaged in the public debate on the ADR are against the practice as long as it is voluntary. The discussion generally revolves around the obligatory practice of arbitration since the beginning of 2018. Social partners are divided in their views on this new practice. While government representatives and the employer organisations are generally content with the current practice of arbitration, the workers' organisations are largely dissatisfied. Government and the employers defend obligatory arbitration because it reduces the burden of labour courts and it is a cheaper and quicker way of settling the disputes. On the other hand, representatives of workers' organisations, despite political divisions among them, unanimously agree that the current practice of compulsory arbitration in individual labour disputes implies workers settling less than they are entitled to under the Labour Code. A number of lawyers, in commentaries appeared on media, states that important legal norms such as the right to legal remedies and fair trial may be violated due to the current practice of the ADR in individual labour disputes.

Yilmaz and Yuzuak (2019)

6.2. ADR outcomes: Are ADR solutions transformative?

Once again, the discussion on the type of solutions reached by ADRs in the labour sphere is not simple, given that there are different relevant perspectives and heterogeneous practices at national level. Reports point to advantages in the different types of solutions reached, as discussed in the first part of this report. However, the

risks are also highlighted. It is therefore important to note the discussion, to understand the risks and benefits and to think about the future of ADR from a non-romanticized view.

6.2.1. Repairmen of relations

Disputes in the workplace frequently involve multiplex relationships.²³ This type of relationship differs from the uniplex relations, of single bond, that are established between strangers, for example, in a relationship of purchase and sale. In multiplex relations, there must be conditions for the continuity of the relationship after the resolution of the dispute. Mini-max solutions tend to enhance the possibility of re-establishing ties between the parts. The continuity of relations can benefit from a more in-depth discussion of disputes, able to reach non-manifest causes, that is, that solves the real problem in addition to the processed dispute.

The reports point to different directions. It is important to take into account diverse readings and to be aware of the potential benefits and risks. Boxes 21 to 23 include excerpts from the reports from Portugal, Austria and the Netherlands highlighting the potential of ADRs to promote consensual solutions and the continuity of relations.

However, the excerpt from the UK report reveals another side of reality, showing that practices may be different. Box 24 presents a situation in which the resolution of a labour dispute by means of a conciliation ended up harming a family member of the worker who happened to be employed in the same company. In the same case, although it was recognized that the worker had been harmed, the compensation seemed low when compared to the harm suffered. In addition, the other party did not recognize the decision, forcing the claimant, in the end, to enter another struggle to receive what was duly entitled.

Box 21 | Mediation and latent conflicts - Portugal report

Interviewee: In court we do not have time to deal with the substance of the matter. Sometimes the substance of the matter goes beyond the existence of a dispute in the employment relationship. For example, a worker who constantly breaches his duty of assiduousness because he has a family problem at home and arrives constantly late to work. What does the employer see? A worker who arrives constantly late and launches a disciplinary process. In court we do not have time to see this fundamental issue, what lies beneath the iceberg. Up here we see that there is indeed a breach of duty, and the worker has to be punished for it. What is underneath, what grounds it? That is why I said that labour relations don't start only when the person punches the clock, it begins when the person wakes up. Because you wake up in the perspective that you have to go to work, but if you have disputes at home, if there is a family issue to solve, that issue won't stop when you punch the clock. We are not robots, we don't get inside a factory and forget the rest. We don't get home and forget the rest. We're not leak-proof. Most of our companies are family-owned businesses and carry an emotional load. Perhaps it is no longer the founding partner's business, now it's their children that take care of company, they may have different perspectives for the workers than those the founding partner - who probably had lunch with the workers - and the newer ones no longer go because they also want a different perspective of what the labour world is. All this leads to conflict, yes, but it also potentiates small things that have to be taken into account when we are analysing a labour dispute. It can be pure and simply a matter of numbers, but many times it's not (PTD6.5.03).

Araújo e Brito (2019)

²³ For a definition of the concept of multiplex relations, see 1.3.

The provincial offices of the Ministry of Social Affairs offer their conciliators who aim to find a friendly settlement to the dispute. On the fact that the conciliation is moderated by a person belonging to the public administration, the interviewed representative of the Chamber of Labour stated that:

The advantage might be of course, that in proceedings incorporating conciliations, as far as we are concerned now, the employment is still ongoing and in an ongoing employment contract it is never useful to resolve it before a court. And it is a little bit better to resolve it before a conciliation authority, however, a third party, meaning an unknown person, is still included, so for the atmosphere it is not very good, but it might be less bad to have a proceeding before a conciliation authority than before an actual court (ATD6.5.03).

[...]

In general, ADR mechanisms in the labour market were created to offer an attractive alternative to solve conflicts and promote a swift return to a constructive working environment:

Our aim is to enable the companies to work. That is the goal. (...) They should get rid of those conflicts as soon as possible in order to keep up with their tasks. (...) because these conflicts are expensive and apart from the money, they need a lot of energy and can take a long time(ATD6.5.02).

This appears to be true especially when the conflict is between an employee and its current employer:

If you see it in the context of the workspace, mediation offers another way of cooperation or rather another work in the company. It is very difficult if for example somebody litigates with their own employer, e.g. before the labour court. Even if they win and they are for example allowed to continue working in their job, it is a bad precondition for any further cooperation. Or if you are now at a different location, but somehow, they let you know that you litigated with your employer. And for a mediation to be successful the outcome has to cover all interests in a way that a further cooperation is possible and it is okay for all. They don't quite like each other afterwards but they can and you can't after a court proceeding (ATD6.5.03).

Vivona (2019)

In the Netherlands, labour disputes are the second major practice (with family law disputes on the first place) area for mediators in the Netherlands. One of the reasons for this is that labour dispute often concern long-standing human relationships, which also means that the stakes are high for the parties involved, particularly for employees. Labour disputes differ in their structures: they can consist of a relationship between an individual employee and a co-worker or direct supervisor, or between a trade union and an employer, or between a trade

union and an employers association.

[...]

A characteristic of mediation is the voluntary decision of both parties to enter into a mediation process, which is different from civil litigation where the mutual decision is often lacking. As such, the parties at hand have a mutual endeavour to work towards a solution for their labour dispute and to work together instead of against one another. The willingness to preserve a good employment relationship is for that reason implied when entering into mediation. In this context, as was illustrated, mediation may sometimes be a more suitable alternative as opposed to litigation and arbitration in cases when the preservation of the labour relationship is the main aim and/or the durability of the contract since the intention of mediation is to achieve a joint decision based on their real interests and to achieve optimum decision-making for each of the parties involved. As such, the good relationship between both parties often remains in place. The empirical findings have indicated that citizens achieve better results this way, with problems being solved more often and agreements being complied with more frequently.

[...]

De Roo argues that one could say that disputes in which interests and/or rights are at stake, can be solved through mediation, as long as both parties are willing to negotiate and hence there is an open climate. At the same time, mediation may be less suitable in conflicts over strict rules, which do not leave much discretion for negotiation or different interpretations. On the other hand, as de Roo suggests, rules that constitute open norms, such as 'reasonable' or 'fairness' are better suited to decide upon through mediation (de Roo, 2018).

Safradin (2019)

Box 24 | ADR and harmful solutions - UK report

Alfie felt discouraged by the conciliator he spoke to:

She was just basically saying, just give it up, they seem to ... I felt like she heard their side of the story and accepted it and rang me up and said, 'look, I've seen how they have everything in place and going to the tribunal isn't going to benefit you in any way'.

Interviewer: Is that what she said?

Yeah. I'm telling you. They don't help you, they ring you one week before you are actually going to court and then ... they don't get to see the bundle of notes, they don't know what's happening, so maybe they had seen that, I don't know, when everything was done to the low of the low.

So you felt they were little bit--?

Dismissive, definitely.

Alfie had wanted some form of legal advice and representation:

Basically I don't understand what to do... I think I need to get a lawyer. I didn't understand the letter that was sent to me.

6.2.2. Social rights and social transformation: the impact of labour ADR

As part of a multi-instance dispute settlement network, ADR systems offer a possibility for citizens to claim their rights and they can be either successful or unsuccessful. Despite issues, we can say that ADRs can contribute to the promotion of access to justice, making it possible to remedy situations in which individual rights are threatened. They allow workers to give voice to their claims, setting out their side of the story and expressing how they experienced the situation of conflict. Through this process of addressing their own problem, there is a possibility of becoming legally empowered (Domingo & Oneil, 2014: 13).²⁴ They can also play an educational role in contributing not only to the redress of a right, but also to the awareness of the parties about it (see box 25).

However, previous reports, in particular D6.3, illustrate that citizens have been negatively affected in realizing their social rights in Europe. Since 2010, Europe has converged to a neoliberal vision on overcoming the crisis and promoting competitiveness, becoming increasingly aligned with international institutions such as the International Monetary Fund (IMF) in terms of structural adjustment and austerity measures. Fear and dystopia became key elements for the naturalization of what was called the “austerity society”. Legitimacy by fear asserts itself as a mechanism for converting the narrative of austerity into a dominant political-social model, assuring the absolute priority of the moral values of economic and labour neoliberalism (Ferreira, 2011). Many people were made vulnerable in the wake of this reality. The more vulnerable, the more exposed people are to the ADRs’ risks that were discussed in the previous sections, and the greater the difficulty in overcoming the inequality of power between the parties involved. In addition, when subject to the confidentiality standard, as is the case in mediation, ADRs are not likely to extend the results achieved.

The devaluation of the mechanisms of social dialogue analysed in Report D6.4 (Araújo and Meneses, 2018) can hardly be offset by waging on ADRs, taking into account that individual struggles cannot replace collective struggles, but merely complement them. The same report presented theses, which defend that neoliberalism, rests to a great extent on the construction of a new subjectivity based on individuality that limits the effects of democracy and weakens workers collective action. In this regard, the UK report's cautionary warning is relevant (see box 26).

Box 25 | ADR educative role - Austria report

An interesting aspect of this institute identified by the study conducted by the Ministry of Social Affairs and confirmed in the course of the interviews with representatives of organisations of persons with disabilities is the positive role of confrontation between the parties in bringing clarity not only on the issue at hand, but also in sensitising the ‘accused’ about its behaviour. Conciliation cases thus have a secondary effect of sensitising the general population about discrimination of persons with disabilities in the workplace. The same study also reports how the effects of the conciliation often move far beyond the parties to bring wider changes in practices and policies of the employers.

My experience shows that within the framework of conciliation proceedings there is a bigger improvement for the involved persons possible than is accounted for in the law. Furthermore, especially

²⁴ For a definition of this concept, see the introduction.

private companies are interested in a positive image. Many conciliation parties only become aware of a discriminatory attitude or action during a proceeding. Very often they are interested in a fast settlement of the conflict. The official framework (summoning by an authority) shows an additional influence. The low-threshold procedure is being used in order to improve the situation and raise awareness (ATD6.5.04).

Vivona (2019)

Box 26 | ADR and de-collectivisation of employment relations - UK report

Acas interventions take a number of forms, mainly designed to address individual rather than collective disputes. This individualising approach, which also permeates the academic ADR literature consulted, can be understood as part of a broader shift toward the de-collectivisation of employment relations,²⁵ itself partly stemming from legal restrictions on union activities.

[...]

The offshoot is that settlements are likely to amount to a renouncement of claimant rights; as Fiss elegantly puts it, 'to settle for something means to accept less than some ideal'.²⁶ In the second category falls the criticism that by setting no precedent, ADR deprives the legal system of opportunities to create new standards for the conduct of employment relations. Yet, jurisprudence on ambiguous statutory provisions is an important part of employment law and serves to articulate and underpin societal values and norms.²⁷ Undocumented proceedings also shield problematic employment practices from public scrutiny. While settlements may benefit individual parties, their privacy allows the sources of conflict to remain ingrained in the wider system and hamper positive knock-on effects on other workers.²⁸ This being said, ADR settlements can also be better suited than those of courts for claimants who seek non-financial forms of compensation, such as a reference, an apology or a change in working arrangements.²⁹

With the continuous decline of union representation and the introduction of legal incentives for workers to resolve individual employment disputes without resorting to the courts, ADR is gaining increasing prominence in the British landscape of industrial relations. The most important sign and motor of this change has been the conciliation service offered by Acas to all workers wishing to lodge a claim in Employment Tribunals. This service normally intervenes rapidly, entails no direct financial cost for parties and seems to be positively evaluated by most of its users as well as (other) employers. However, unions have been more critical of its capacity to deliver fair outcomes, and both legal theory and available data suggest important pitfalls in terms of procedural and substantive justice. When it does not conclude in a settlement, conciliation may lengthen the dispute resolution process in a way that imposes disproportionate burdens on precarious workers. Whatever its outcomes, it also offers employers an opportunity to shape workers' aspirations and expectations through the authoritative voice of conciliators, whose impartial position can be confused with that of a judge despite the fact that they have no

²⁵ Trevor Colling (2004), 'No claim, no pain? The privatization of dispute resolution in Britain', *Economic and Industrial Democracy* 25 (4), 555-579; Gill Dix, Keith Sisson & John Forth (2009), 'Conflict at work: The changing pattern of disputes', in William Brown, Alex Bryson, John Forth and Keith Whitfield (eds), *The evolution of the modern workplace*, Cambridge: Cambridge University Press, 176-200.

²⁶ Fiss, op. cit., 1085. See also Budd & Colvin, op. cit., 473-475 and Busby & McDermont (2012), op. cit., 181.

²⁷ Dolder, op. cit., 341.

²⁸ Dolder, op. cit., 337; Ridley-Duff & Bennett, op. cit., 114; Colling, op. cit., 573; Dickens (2012), op. cit., 34, 40.

²⁹ Dickens (2012), op. cit., 39.

mandate to interpret legal rights and standards. The ambiguity is compounded by Acas' multiple roles, including a helpline on employment rights which many employees contact prior to conciliation, as well as by workers' limited knowledge of labour law and uncrystallised expectations regarding the functions and outcomes of Acas. In contrast, employers tend to have better prior knowledge of the conciliation procedure, which gives them the capacity to use it strategically. High rates of satisfaction with Acas services may thus conceal that conciliation can result in workers accepting unfair settlements in which their legal rights are compromised. Also of concern is the prevalence of confidentiality agreements which can make further claims by other employees difficult to pursue, and which mean that employer abuses of rights are kept out of the public domain.

[...]

This somewhat pessimistic conclusion derives from the experience of highly precarious, typically unorganised workers, and may not apply in highly unionised workplaces where the bargaining power of different parties tends to be more balanced. In fact, unionisation itself has been associated to a greater number of disputes reaching the attention of senior managers but a lesser recourse to Employment Tribunals,³⁰ raising the possibility (pointed out by the union representatives interviewed) of an elective affinity between collective bargaining and fair ADR. Even if this hypothesis were confirmed, however, it would merely establish that ADR can reflect the justice or injustice of employment relations, but not rebalance the scale.

Conclusions

We concluded in the previous deliverables within WP6 that participative and redistributive principles are in counter-cycle with the current political economy trends and also with the concrete European path that was initiated some decades ago and consolidated after the 2008 crisis. Despite the fact that rights, progress and efficiency come together in the narrative over which the EU stands and ideals associated with labour justice, distribution and participation are at the core of the European Social Model, some of the EU foundational pillars are increasingly under pressure. The “economising on justice” approach that separates economy from moral philosophy is consistent with the European choices that promote economy over justice, aligning the European economic policies not with social justice but with the rules of financial markets.

³⁰ See Dickens (2014), op. cit., 245-246.

The current situation has a different impact on countries and people. Member states went through distinctive austerity levels and structural adjustment measures and some groups were particularly affected by the global measures. However, inequalities result not only from the erosion of stated rights. Mounting situations of social injustice have been paralleled with increasing shortcomings in the institutionalised response of the judicial system. Persons in vulnerable situations are more likely to have their rights violated and less likely to have the skills to represent themselves and the resources to hire legal representatives. Effective access to justice is an essential feature of any well-functioning democratic society. In the current context it is crucial to evaluate if Europe has mechanisms to overcome the obstacles to the access of labour justice.

This particular deliverable discussed the labour ADR mechanisms' potential to promote access to labour law and workers capacity to contest power inequalities and claim for social rights. The main question of concern that this report aimed to answer is the following: in the context of high unemployment rates, of the dismantling of ESM and of the attacks on collective bargaining, are individual labour ADR useful tools for accessing justice and claiming labour rights? In other words, do these mechanisms improve access to justice or do they reproduce a vicious circle of unequal power relations between workers and employers?

The philosophical roots of ADR go back to the discussion on promoting access to law and justice in the 1960s and 1970s in the United States. An intense discussion on the role of extra-judicial mechanisms – ADR, informal justice, community justice, popular justice – has involved legal scholars, legal sociologists and legal anthropologists during the last two decades of the 20th century.

On the one hand, it is recognized that ADRs tend to surpass some of the barriers to access justice. In general, they are less expensive, faster and geographically closer to citizens than courts. Lawyers, judges and other legal professionals share a common language whereas ADRs tend to use a language that the ordinary citizen understands. In addition, formal legal proceedings can be complicated and confusing, while informal ones are more familiar and easy to understand. Besides, informal justice allows a deeper comprehension of the conflicts and to solve not only the superficial dispute but other underlying problems that may exist. This may lead to a long-term solution and allow for the continuity of the relations between parties. This is particular relevant for multiplex relations.

On the other hand, some risks are underlined when it comes to ADR in labour and other disputes: the creation of a dual justice system, with courts serving first class citizens, and informal justice serving second class citizens that cannot afford or understand courts procedures; the inexistence of mechanisms to balance power relations and the reproduction of societies' power asymmetries; and the possibility of being co-opted by the state in order to impose an agenda. Concerning labour ADRs in particular, a main concern raises: the possibility of reproducing the power imbalance between employees and employers, which at the same time weakens collective struggles.

In the last decade, the academic discussion lost intensity and the European reality presents inconsistent steps with some relevant legal efforts toward informal justice taking very long to be translated into practical results. Mediation has become the more popular way of alternative dispute resolution in labour disputes over the last years across the countries studied. In doing so, the parties do not hand over the decision to a third party, but they themselves retain the option of agreeing or disagreeing with a proposal. However, the European landscape of labour ADR is heterogeneous and our empirical data have illustrated that ADR mechanisms may present multiple forms. In addition, good practices and good results coexist with bad practices and bad results, sometimes within the same institutions.

In order to learn from the empirical reality, we have identified five dimensions of the variable of proximity justice: geography, costs, time, culture and visibility. Geography appears to be a less relevant variable to compare ADR and

courts' accessibility. Differently, the empirical data show that costs and time are two dimensions of proximity in which ADRs tend to present clear cross countries advantages when compared with courts.

Cultural or human proximity is a crucial proximity dimension. The creation and development of dispute resolution forums that use common sense language and familiar routines, at the same time increasing citizens' trust, may reduce distance between litigants and justice institutions. However, assuming that ADRs always fit into this picture of familiarity and that citizens are invariably more comfortable with informal justice would be a romanticized vision of reality. In ADR, legal representation is usually not compulsory as the parties are expected to reach a decision by themselves with the help of a third party. But if the parties are not familiar with procedures and not comfortable expressing themselves, informality may be translated into a repressive resolution. If one party lacks relevant legal information, may feel compelled to accept an uncomfortable settlement. In cases of conciliation in which the third party has a more proactive role it is important to ensure that both parts understand that the conciliator cannot impose a solution upon them.

Modern law and courts have a long presence in European societies and even though they have overlapped previous informal mechanisms, courts now occupy a large part of the imaginary of conflict resolution of citizens and legal operators themselves. The variable of visibility assumes relevance throughout the national reports although with different names. It is related to a concern defined in the referred research on the implementation of the 2008 Mediation Directive as "the lack of publicity and public knowledge about mediation" (De Palo, 2014). Solving the problem by making ADR compulsory is a contested decision as the volunteer character is a crucial feature of ADR at least for mediation.

As part of a multi-instance dispute settlement network, ADR mechanisms offer a possibility for citizens to claim their rights. They can be either successful or unsuccessful as it happens with courts. Despite its challenges, we can say that labour ADR can contribute to the promotion of access to labour justice, making it possible to remedy situations in which individual rights are threatened. They allow workers to give voice to their claims, setting out their side of the story and expressing how they experienced the situation of conflict. This process legally empower workers, by allowing them to address their own disputes. ADR can also play an educational role, as it does not only contribute to the redress of a right, but also raises awareness of the parties of such rights.

Nevertheless, the devaluation of the mechanisms of social dialogue analysed in D6.4 (Araújo and Meneses, 2018) can hardly be offset by waging on ADRs, taking into account that individual struggles cannot replace collective struggles, but only complement them. In this regard, the UK report's cautionary warning is relevant: "This individualising approach, which also permeates the academic ADR literature consulted, can be understood as part of a broader shift toward the de-collectivisation of employment relations, itself partly stemming from legal restrictions on union activities" (Kirk *et. al.* 2019). This is hardly surprising. D6.4 presents a discussion about the way neoliberalism promotes a new subjectivity based on individuality that limits the effects of democracy and weakens workers' collective action.

ADR must not serve to disempower workers and be a repository of what is classified as "junk cases". The fact that a conflict is not judiciable does not mean it is irrelevant to a citizen and does not substantially disrupt lives. Providing an opportunity to resolve it within a flexible forum can be an advantage if that forum is considered legitimate by the litigants and offers a solution deemed appropriate. ADR configure a second-class justice system when citizens use them only because they are cheaper or they have no legal information to understand their rights and their options.

In light of the foregoing, this research has identified the following policy recommendations in order to achieve a more effective realization of labour justice through ADR:

- Countries must invest on promoting the visibility of ADR. Citizens and legal professionals must be informed about the available ADRs, their advantages and disadvantages. Information must not be only available online or on the phone to citizens who search for it. There must be campaigns in schools, courts, private companies and public services to raise awareness on how to solve conflicts through ADR. Forms of dissemination through social media must be explored as well.
- Organisations must be informed about the possibility of including clauses, incorporating references to mediation and conciliation, in their key policies and employment documentation, including employment contracts.
- Parties need to be clearly informed in detail about the substantive ADR procedures before accepting its use.
- In labour disputes in particular, it is crucial that workers are well informed about their labour rights. Legal information must be available before the beginning of a mediation, conciliation or arbitration.
- Strong ethical ADR codes, continuous adequate training for ADR professionals and regular evaluation of these mechanisms performance must be part of a global strategy of investment in this field. The increase of mediation as a private practice in labour dispute raises questions over the qualification standards, together with establishing and communicating best practices.
- In countries where individual alternative labour dispute settlement is lacking such as Hungary, it would be necessary either to establish out-of-court dispute resolution bodies specialised on individual labour law cases or to expand the competence of existing collective labour dispute agencies to cover individual cases.
- Decisions making the ADR in individual labour conflicts obligatory should be revisited as the mandatory requirement is contradictory to the ethos of ADR whose success is highly dependent on its voluntary character.
- Ensure that citizens have access to the required information about their labour rights and duties appears to be another condition to not yield to the pressure of settling with an unfair solution they are uncomfortable with. ADR must not be viewed as a second-class justice, but citizens' own choice when they recognize there are a better option. In case of being mandatory there must be, as in a first instance court, the possibility of appeal.
- The investment of labour ADR must be complementary to the investment in other forms of ensuring labour justice: social dialogue structures, labour rights and other forms of social protection that define Europe as a common political project based on people and not simply legal engineering compatible with a neoliberal world based on markets.

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List of interviews

NLD6.5.01	Representative of Ministry of Justice and Security, Female
NLD6.5.02	Academic specialized in ODR and ADR in the Netherlands, Female
NLD6.5.03	NL Equality Body, Netherlands Institute for Human Rights, Female
NLD6.5.04	Representative of the Dutch Consumer Agency, Female
NLD6.5.05	Two Representatives of the Dispute Commission in the Hague, Female and male
NLD6.5.06	Two Academics specialized in ADR, Female and male
NLD6.5.07	Lawyer and mediator – practice expert ADR in individual labour disputes, Female
NLD6.5.08	Representative ODR platform in dismissal rights, Female
UKD6.5.01	Male, union representative
UKD6.5.02	Male, employer representative
UKD6.5.03	Male, employer representative
UKD6.5.04	Male, union representative
ATD6.5.01	Representative of Vulnerable People’s Organisation
ATD6.5.02	Members of Trade Unions
ATD6.5.03	Members of Employers’ Confederations
ATD6.5.04	Representative of Vulnerable People’s Organisation
ATD6.5.05	Third parts of ADR (mediators or arbitrators)
ATD6.5.06	State Officials
PTD6.5.01	Two state officials, Males
PTD6.5.02.	Mediator, Male
PTD6.5.03.	Mediator, Female
PTD6.5.04.	Lawyer, Male
PTD6.5.05.	Trade union leader, Male
HUD6.5.01	Lawyer, employee of the state ADR services, 42, male
HUD6.5.02	Head of an independent union, 59, male
HUD6.5.03	Leader of a local unit of a nation-wide trade union, 32, male
HUD6.5.04	Works council head, 42, male
HUD6.5.05	Leader of a grass-root organization, 52, female
HUD6.5.06	Trade union leader, specialist in ADR, 45, male