

ANNEX 3

Mediation self-assessment questionnaire for parties to a dispute. The tool to assess if your case is suitable for mediation.

Excerpt from the [“Mediation meets Judges EU toolkit”](http://www.mediationmeetsjudges.eu) available on
www.mediationmeetsjudges.eu

Disclaimer

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Methodology

Provide answers when possible to the following questions. When the question is not relevant or the answer is not clear choose the middle column “doubt”.

	Yes	Doubt	No
1. Is this dispute delaying any decision or development opportunity for you and your business?			
2. Is a quick solution to the dispute important for you?			
3. Are you looking for a long-lasting solution to the dispute?			
4. Is there an interest in saving/maintaining the business relationship with the other party?			
5. Is there any point of the dispute that you would like to discuss/clarify with your counterpart outside the strictly legal aspects of the dispute?			
6. Would you prefer some elements of the dispute not to become public/remain confidential?			
7. Have you any doubt about the outcome of the trial?			
8. Do you consider that the litigation costs will reduce or even exceed what you could recover through the lawsuit?			
9. Do you have enough resources to dedicate to the dispute and to invest in litigation costs (including lawyer/technical experts etc.)?			
10. Is it important for you to maintain control of the outcome of the dispute?			
11. Is there any fact/aspect of the dispute that you consider would not be sufficiently discussed/dealt with during the trial? Would you have the opportunity to discuss it?			
12. Do you fear that a Court decision may be difficult to enforce?			
13. Will your allegations be easy to prove to the judge? Do you have strong evidence to support your allegations?			
14. Can you handle the emotional burden generated by litigation?			
15. Is there any likelihood that you don't need a legal precedent over the legal aspects of the dispute?			
16. Are you looking for public vindication?			
17. Is there any other underlying reason for the trial?			
18. Are you looking for an apology from the/one of the counterparts?			
19. Did your lawyer give you a clear diagnostic about the procedure and all aspects concerning the judicial proceedings? (Time, money, odds,...)			

Results interpretation

Where a “yes” answer is given to one of the question, this is an indication that mediation would be preferable. Where a “no” answer is given, this is an indication that litigation is more appropriate. A significant number of “yes” therefore suggests trying to solve the case through mediation.

Elucidation

Question 1 - Is this dispute delaying any decision or development opportunity for you and your business?

A dispute can have as effect to freeze the taking of strategic decisions of a company. Reasons can be uncertainty on the amount of money at stake but also on the rights and duties related to the business model itself (e.g. dispute relating to intellectual property rights, dispute between shareholders...). Mediation has the advantage of being much faster than litigation and therefore provides the security needed to pursue the business.

Question 2 - Is a quick solution to the dispute important for you?

It is demonstrated that one of the most important reasons to go to mediation is the need to find a quick solution to the dispute (along with saving money). Mediation may take as little as a few hours, once all participants have agreed on a meeting date.

Question 3 - Are you looking for a long-lasting solution to the dispute?

Parties, by working on a settlement, retain ownership on the decision and work with the mediator on the implementation and workability of the common agreement. Mediation can help parties to restore dialogue and have an open discussion. This helps in developing a workable settlement.

Question 4 - Is there an interest in saving/maintaining the business relationship with the other party?

Confrontational court battles and arbitration proceedings damage business or personal relationships almost every time. Sometimes the proceedings will also affect relationships with third parties. In mediation, the stakeholders will sit together, communicate about their dispute and collaborate on a resolution. There is a greater likelihood of saving an ongoing business relationship. Individuals in conflict are also likely to preserve and even improve their personal relationships with one another as a result of using mediation.

Question 5 - Is there any point of the dispute that you would like to discuss/clarify with your counterpart besides the strictly legal aspects of the dispute?

In mediation, the law is a point of reference throughout the entire process. However, within that legal framework, mediation provides space to craft highly individualised agreements that reflect the parties’ understanding of the conflict.

Question 6 - Would you prefer some elements of the dispute not to become public/remain confidential?

The deficit of information may be a source of conflict. Mediation can provide the secure environment that will ease the exchange of information. Mediation is a confidential process protected as such by the law and by a signed statement between the parties involved. Mediation is completely confidential and is backed up by law and a confidentiality statement by the involved parties. Parties that want to retain discretion on the dispute and the discussion thereby related will see an interest in mediation.

Question 7 – Have you any doubt about the outcome of the trial?

Parties that send a case to the court delegate the resolution of the conflict to a judge. With mediation, the parties retain control of any decision to resolve their dispute. When parties wish to retain control over the solution given to the case, mediation will be appropriate.

Question 8 - Do you consider that the litigation costs will reduce or even exceed what you could recover through the lawsuit?

Mediation is, with few exceptions, significantly cheaper than arbitration or litigation. When litigation generates disproportionate costs as compared to the value of the conflict, mediation will often be a good option. The lower the value of the dispute, the more mediation can help parties in defining the dispute in a faster and cost-effective way. The absence of litigation cost will actually open a window of opportunity for negotiation. The cost of lawyers and other professionals (e.g. technical advisers or experts) will be limited with mediation since the duration of the process is significantly less and more predictable.

Question 9 - Do you have enough resources to dedicate to the dispute and to invest in litigation fees (including lawyer/technical experts etc.)?

Mediation is, with little exception, significantly cheaper than litigation. Mediation will be in most cases a more affordable dispute resolution mechanism.

Question 10 - Is it important for you to maintain control of the outcome of the dispute?

Parties that address a case to the court delegate the resolution of the conflict to a judge. With mediation, the parties retain control of any decision to resolve their dispute. When parties wish to retain control over the solution given to the case, mediation will be appropriate.

Question 11 - Is there any fact/aspect of the dispute that you consider would not be sufficiently discussed/dealt with during the trial? Would you have the opportunity to discuss it?

Mediation can help parties to restore dialogue and have an open discussion. This in turn helps in developing a workable settlement.

Question 12 - Do you fear that a Court decision may be difficult to enforce?

Parties do not always enforce the judicial decision for different reasons (difficulty of implementation, lack of resources, voluntary opposition to the decision...) or will be appealed whatever the decision is. Mediation does not suffer the same difficulties. It has a rate of voluntary enforcement that is very high. Parties, by working on a settlement, take ownership on the decision and work with the mediator on the implementation and workability of the common agreement.

Question 13 - Will your allegations be easy to prove to the judge? Do you have strong evidence to support your allegations?

In some cases, the judge decision can be unfair for at least one of the parties due to the impossibility for the judge to rely on a number of elements or evidence (e.g. procedural reasons). In such cases, mediation can be beneficial to the parties as it is not limited by procedural law. The capacity to provide evidence can sometimes be overcome.

Question 14- Can you handle the emotional burden that comes from litigation?

Some disputes are highly emotionally charged. Parties may require a tailored approach that sufficiently recognises and validates the underlying emotional issues that are driving the case and therefore produces a more complete resolution. If emotional needs are left unaddressed, a party may experience a feeling of unfairness or defeat even if a court rules in its favour. Mediation is more likely to bring satisfaction in these cases.

Question 15 - Is there any likelihood that you don't need a legal precedent over the legal aspects of the dispute?

Some cases are brought to the court with the intention of setting a new legal precedent which will have a broader social impact than the case itself. Results reached through mediation are not known or binding on other parties, so even if the mediation brings a successful result, it will not have much bearing on future cases. Mediation is therefore not beneficial for such cases. Legal precedent cannot be set in mediation.

Question 16 - Are you looking for public vindication?

Parties that are looking for public vindication may choose either way: court or mediation. The court decision is public and can bring satisfactory vindication. The mediation settlement is confidential but parties may, in the framework of their agreement, foresee that one of the parties will make a public apology or that the parties will issue a common press release. The advantage of mediation is that the public announcement will be drafted jointly by the parties.

Question 17 - Is there any other underlying reason for the trial?

When requested to settle a case, the judge is limited by the petitions of the parties even if there are clear (or less clear) underlying causes or needs. Unexpressed needs may spark a new conflict as soon as the decision is taken. Mediation is not limited by the initial demand of the parties. It is the work of the mediator to understand and address underlying interests and possible related conflicts with the objective of reaching a comprehensive settlement.

Question 18 - Are you looking for an apology from the/one of the counterparts?

An apology involves the acknowledgement of injury with an acceptance of responsibility, effect and vulnerability. Apology is sometimes necessary but difficult. Mediation makes space for apologies.

Question 19 - Did your lawyer give you a clear diagnostic about the procedure and all aspects concerning the judicial proceedings? (Time, money, odds,...)

Parties would probably not go for litigation if they knew the costs it involves, both from a financial, emotional and time perspective. As supported by various studies, mediation is faster, cheaper and involves, if successful, a final agreement that satisfies all parties involved in the dispute.