

COMMISSION OF THE EUROPEAN COMMUNITIES

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2004/0251 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects of mediation in civil and commercial matters

{SEC(2004) 1314}

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. SCOPE AND OBJECTIVES OF THE PROPOSAL

1.1. Objective

1.1.1. Ensuring better access to justice

Better access to justice is one of the key objectives of the EU's policy to establish an area of freedom, security and justice, where individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States. The concept of access to justice should, in this context, include promoting access to adequate dispute resolution processes for individuals and business, and not just access to the judicial system.

The proposed directive contributes to this objective by facilitating access to dispute resolution through two types of provisions: first, provisions that aim at ensuring a sound relationship between mediation and judicial proceedings, by establishing minimum common rules in the Community on a number of key aspects of civil procedure. Secondly, by providing the necessary tools for the courts of the Member States to actively promote the use of mediation, without nevertheless making mediation compulsory or subject to specific sanctions.

Provisions touching the mediation process or the appointment or accreditation of mediators have been excluded from the proposed directive. Having regard to the reactions to the Green paper of 2002 and current developments at national level, it is not clear that legislation is the preferred policy option as regards this type of provision. While excluding regulatory measures concerning the mediation procedure itself from this proposal the Commission has instead sought to encourage self-regulatory initiatives and is seeking to continue to do so through the proposed directive also.

In the consultations on the preliminary draft of this proposal most respondents endorsed the overall approach of the draft concerning the issues covered as well as the issues excluded from it. Compared to the preliminary draft certain changes, mainly of a technical nature, have been made to specific provisions and are further explained in the annex.

1.1.2. A sound relationship between mediation and civil proceedings

What have been retained for this proposal are essentially matters which cannot be adequately addressed through market-based solutions. This concerns notably civil procedural rules which may impact on the use of mediation as well as on its effectiveness. The interaction between mediation and traditional civil proceedings can take place at several occasions, for example:

– The parties consider use of mediation immediately after the dispute has arisen, as an alternative to launching civil proceedings; if the parties do chose to use

mediation and fail to reach a settlement agreement, civil proceedings are launched after the termination of the mediation;

– If a settlement agreement is reached through mediation, one of the parties may fail to honour the agreement, calling for civil proceedings to be launched anyway;

– The parties launch civil proceedings immediately after the dispute has arisen, without having (yet) considered the possibility of mediation.

At present the interaction between mediation and civil proceedings presents a number of uncertain elements, due to the absence of or discrepancies between national procedural laws, elements which make themselves known with particular force in situations involving cross-border elements. Even if mediation may be the most suitable form of dispute resolution in a given case the parties may therefore opt for traditional civil proceedings in view of these uncertainties. A stable and predictable legal framework should contribute to putting mediation on an equal footing with judicial proceedings where factors related to the specific dispute play the most significant role for the parties in determining their choice of dispute resolution method. Such a framework should also help to preserve the possibility for the parties to solve their dispute through judicial proceedings even if mediation is attempted.

1.1.3. Promoting the use of mediation

The value of increasing the use of mediation rests principally in the advantages of the dispute resolution mechanism itself: a quicker, simpler and more cost-efficient way to solve disputes, which allows for taking into account a wider range of interests of the parties, with a greater chance of reaching an agreement which will be voluntarily respected, and which preserves an amicable and sustainable relationship between them. The Commission believes that mediation holds an untapped potential as a dispute resolution method and as a means of providing access to justice for individuals and business.

The role of the Community in directly promoting mediation is however by necessity limited and the only concrete measure to promote mediation contained in the proposal is the obligation for Member States to allow courts to suggest mediation to the parties. Ensuring a sound relationship between mediation and judicial proceedings will however indirectly contribute to promoting mediation also.

The pursuit of the objectives of this proposal can not take in place in isolation without regard to the very provision of mediation services. The question of quality of mediation services must therefore be addressed together with, and as a function of, the other provisions of the proposed directive which must operate with a sufficient level of mutual trust between the Member States in cross-border situations.

1.1.4. The relationship with the organisation of the judicial systems of the Member States

One of the often quoted benefits of mediation is that its increased use can offload pressure on the court system, thereby reducing what are often long delays in case-handling and possibly allowing for savings of public resources. As the proposed directive seeks to promote the use of mediation, it could indeed have a positive

impact in this sense. This is however not pursued as an independent objective, for several reasons. First, the organisation of the judicial system is the sole competence of the Member States. Secondly, and most importantly, mediation has a value in itself as a dispute resolution method, to which citizens and business should have easy access and which deserves to be promoted independently of its value in off-loading pressure on the court system. The Commission does not see mediation as an alternative to court proceedings; it is rather one of several dispute resolution methods available in a modern society and which may be the most suited for some, but certainly not all, disputes. Moreover, it should be stressed that the availability of ADRs in general can not in any way detract from the obligation of Member States to maintain an effective and fair legal system that meets the requirements of the European Convention of Human Rights, which forms one of the central pillars of a democratic society.

1.1.5. Impact assessment

A preliminary impact assessment of this proposal was carried out in the context of the Commission's annual policy strategy for 2004. The proposal has not been selected for an extended impact assessment. The proposed directive aims at increasing the use of mediation in the EU, which will have beneficial economic effects by lowering transaction costs for individuals and business, through a quicker and more cost-efficient resolution of disputes. Mediation can also contribute to more sustainable economic and social trends in preserving the relationship between the parties after the dispute has been solved, in contrast to the often disruptive effects of solving a dispute through an adjudicatory process. The consultation process and other preparatory steps are described in the annex. In terms of alternative policy options the proposed directive contains mainly rules on civil procedure, and the results can not be achieved using another policy instrument.

1.2. Legal basis

The objective and content of this proposed directive fall squarely within the scope of Article 65 TEC since it concerns civil procedural rules, where the provision on quality and training in Article 4 is ancillary to the other provisions. The proposed directive is necessary for the proper functioning of the internal market in view of the need to ensure access to dispute resolution mechanisms for individuals and business exercising the four freedoms and in view of the need to ensure the freedom to provide and to receive mediation services.

As has been stressed in the description of the objectives of the proposal the need for Community action in this field stems from the need to ensure legal certainty throughout the duration of a dispute regardless of the presence of cross-border elements at one stage or another. To ensure a coherent legal framework it is therefore necessary to address key aspects of the whole chain of possible events that can follow after the dispute has arisen, having regard to any possible scenario (success/failure of the mediation, settlement agreement followed by both parties or not, etc).

In the context of ADR the impact of cross-border elements is potentially greater than when considering measures relating to civil proceedings in isolation, since it is necessary to have regard to relevant factors at the time of the mediation as well as at

the time of any subsequent civil proceedings, including the circumstance that these factors may change in the meantime. For example, cross-border elements may come from the domicile or place of business of one or both of the parties, the place of the mediation, or the place of the competent court. The agreement to mediate may in itself be governed by a different law than that which governs the original legal or contractual relationship between the parties, and an ensuing settlement agreement may be governed by the law of yet another third country. The settlement agreement may have to be enforced in yet another Member State depending on, for example, the location of the debtor's assets at the time when enforcement is sought.

However, it would not be feasible to restrict the scope of the proposal so as to only aim at removing obstacles created by cross-border elements or to ease the resolution of only those disputes displaying a cross-border element, however defined.

In assessing the suitability of mediation as a dispute resolution method for a given dispute, cross-border elements make up for only one of several relevant circumstances to be taken into account. Other circumstances include the nature of the dispute and the merits of the case as well as factors related to costs, delay and prospects of success. Promoting mediation in relation to those disputes that display a cross-border element only would therefore be arbitrary and create a risk of discriminatory effects, since the courts would suggest mediation to some parties only depending on their place of residence. A restriction of this type will undoubtedly entail a substantial reduction in the practical impact of the proposed directive also. Making the applicability of the civil procedural rules contained in the proposed directive subject to the presence of cross-border elements would rather lead to increased legal uncertainty. Alternatively such a restriction in scope may leave the applicability of the directive in the hands of the parties, who could introduce cross-border elements through their choice of mediator or court for the dispute in order to benefit from the rules laid down by the directive.

The proposed directive will form an important part of the legal framework for mediation services in the Community, as concerns the freedom to provide services in another Member State as well as the freedom to receive services. A limitation in scope to cross-border situations would lead to the creation of two parallel legal regimes, possibly even different standards as concern the provision and receipt of mediation services, with a risk of discriminatory effects for users as well as providers of mediation services. Such effects run counter to the principles of the internal market as well as the efforts of the Community to simplify the regulatory framework for individuals and business.

In conclusion the Commission considers that introducing an explicit condition of cross-border implications would invalidate the objectives of the proposed directive and be counterproductive to the proper functioning of the internal market. The directive must therefore apply to all situations regardless of the presence of cross-border elements at the time of the mediation or at the time of the judicial proceedings.

1.3. Subsidiarity and proportionality

In view of the need for legal certainty and predictability in situations involving the relationship between mediation and civil proceedings in situations displaying a cross-

border element and the need to ensure the proper functioning of the internal market for the provision of and receipt of mediation services the objectives of this proposal cannot be sufficiently accomplished by the Member States. Measures taken at Community level will be more effective compared to individual initiatives taken by each Member State, for reasons of coherence and reasons of providing certain basic uniform rules applicable in cross-border situations as well as in domestic cases.

The provisions of the proposal are strictly limited to what is necessary to reach the objectives. A directive has been chosen as the most appropriate instrument since the provisions are designed to achieve certain specific objectives while leaving the means for how to reach those objectives to Member States' discretion. The proposal also confines itself to issues which can only be solved through legislation while inversely issues where market-based solutions are feasible have been excluded from the scope.

2. BACKGROUND TO THE PROPOSAL, CONSULTATION WITH INTERESTED PARTIES, AND COMMENTS ON MAIN PROVISIONS

The staff working paper annexed to this proposal provides further information on these issues.

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DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61 (c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[3],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The European Council meeting in Tampere on 15 and 16 October 1999 called for, in relation to better access to justice in Europe, for alternative, extra-judicial procedures to be created by Member States.

(3) The Council adopted conclusions on alternative methods of settling disputes under civil and commercial law in 2000, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) The European Commission presented a Green paper in 2002, taking stock of the existing situation as concerns ADRs in Europe and initiating wide-spread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of ensuring better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice should encompass access to

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1 OJ C , , p. .
2 OJ C , , p. .
3 OJ C , , p. .

judicial as well as extra-judicial dispute resolution methods. This directive should contribute to the proper functioning of the internal market, in particular as concerns the provision and receipt of mediation services.

(6) Mediation can provide a cost-efficient and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Settlement agreements reached through mediation are more likely to be enforced voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) Framework legislation, addressing key aspects of civil procedure in particular, is therefore necessary to promote the further use of mediation and to ensure that parties having recourse to mediation can rely on a predictable legal framework.

(8) This directive should cover processes where two or more parties to a dispute are assisted by a mediator to reach an amicable agreement on the settlement of the dispute, but exclude processes of an adjudicatory nature such as arbitration, ombudsmen schemes, consumer complaint schemes, expert determination or processes administered by bodies issuing a formal recommendation, be it legally binding or not, as to the resolution of the dispute.

(9) A minimum degree of compatibility of civil procedural rules is necessary as concerns the effect of mediation on limitation periods and how the confidentiality of the mediator will be protected in any subsequent judicial proceedings. The possibility for the court to refer the parties to mediation should also be covered, while retaining the principle that mediation is a voluntary process.

(10) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that settlement agreements are dependant on the good will of the parties for their enforcement. It is therefore necessary to ensure that all Member States provide for a procedure whereby a settlement agreement can be confirmed in a judgment, decision or authentic instrument by a court or public authority.

(11) Such a possibility will allow for a settlement agreement to be recognised and enforced across the Union, under the conditions laid down by Community instruments on mutual recognition and enforcement of judgments and decisions.

(12) To ensure the necessary trust between the Member States in the respect of confidentiality, suspension of limitation periods, and recognition and enforcement of settlement agreements, effective quality control mechanisms must be put in place concerning the provision of mediation services and training of mediators.

(13) These mechanisms and measures, which shall be defined by the Member States and may include having recourse to market-based solutions, should aim at preserving the flexibility of the mediation process and the private autonomy of the parties. The Commission shall encourage self-regulatory measures at Community level through, for example, development of a European code of conduct addressing key aspects of the mediation process.

(14) In the field of consumer protection, the Commission adopted in 2001 a formal recommendation[4] which establishes minimum quality criteria that out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. It is advisable that any mediators or organisation concerned by the recommendation respect its principles. In order to ensure the dissemination of information concerning these bodies, the Commission is setting up a database of out-of-court schemes that Member States consider as respecting the principles of the recommendation.

(15) This directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.

(16) Since the objectives of this directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(17) [In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive. / In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community, the United Kingdom and Ireland do not take part in the adoption of this Directive, which is therefore not binding on those Member States.]

(18) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is therefore not bound by it or subject to its application.

HAVE ADOPTED THIS DIRECTIVE:

Article 1 – Objective and scope

1. The objective of this directive is to facilitate access to dispute resolution by promoting the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.

2. This directive shall apply in civil and commercial matters.

3. In this directive, "Member State" shall mean Member States with the exception of Denmark.

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[4] Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

Article 2 – Definitions

For the purposes of this Directive the following definitions shall apply:

(a) "Mediation" shall mean any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or prescribed by the national law of a Member State.

It shall not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute.

(b) "Mediator" shall mean any third party conducting a mediation, regardless of the denomination or profession of that third party in the Member State concerned and of the way the third party has been appointed or requested to conduct the mediation.

Article 3 – Referral to mediation

1. A court before which an action is brought may, when appropriate and having regard to all circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may in any event require the parties to attend an information session on the use of mediation.

2. This directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not impede on the right of access to the judicial system, in particular in situations where one of the parties is resident in a Member State other than that of the court.

Article 4 – Ensuring the quality of mediation

1. The Commission and the Member States shall promote and encourage the development of and adherence to voluntary codes of conduct by mediators and organisations providing mediation services, at Community as well as at national level, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall promote and encourage the training of mediators in order to allow parties in dispute to choose a mediator who will be able to effectively conduct a mediation in the manner expected by the parties.

Article 5 – Enforcement of settlement agreements

1. Member States shall ensure that, upon request of the parties, a settlement agreement reached as a result of a mediation can be confirmed in a judgment, decision, authentic instrument or any other form by a court or public authority that renders the agreement enforceable in a similar manner as a judgment under national law,

provided that the agreement is not contrary to European law or to national law in the Member State where the request is made.

2. Member States shall inform the Commission of the courts or public authorities that are competent for receiving a request in accordance with paragraph 1.

Article 6 – Admissibility of evidence in civil judicial proceedings

1. Mediators, as well as any person involved in the administration of mediation services, shall not in civil judicial proceedings give testimony or evidence regarding any of the following:

   (a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;

   (b) Views expressed or suggestions made by a party in a mediation in respect of a possible settlement of the dispute;

   (c) Statements or admissions made by a party in the course of the mediation;

   (d) Proposals made by the mediator;

   (e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the mediator;

   (f) A document prepared solely for purposes of the mediation.

2. Paragraph 1 shall apply irrespective of the form of the information or evidence referred to therein.

3. The disclosure of the information referred to in paragraph 1 shall not be ordered by a court or other judicial authority in civil judicial proceedings and, if such information is offered as evidence in contravention of paragraph 1, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence

   (a) to the extent required for the purposes of implementation or enforcement of a settlement agreement reached as a direct result of the mediation,

   (b) for overriding considerations of public policy, in particular when required to ensure the protection of children or to prevent harm to the physical or psychological integrity of a person, or

   (c) if the mediator and the parties agree thereto.

4. The provisions of paragraphs 1, 2 and 3 shall apply whether or not the judicial proceedings relate to the dispute that is or was the subject matter of the mediation.

5. Subject to paragraph 1, evidence that is otherwise admissible in judicial proceedings does not become inadmissible as a consequence of having been used in a mediation.

Article 7 – Suspension of limitation periods

1. The running of any period of prescription or limitation regarding the claim that is the subject matter of the mediation shall be suspended as of when, after the dispute has arisen:

   (a) the parties agree to use mediation,

   (b) the use of mediation is ordered by a court, or

   (c) an obligation to use mediation arises under the national law of a Member State.

2. Where the mediation has ended without a settlement agreement, the period resumes running from the time the mediation ended without a settlement agreement, counting from the date when one or both of the parties or the mediator declares that the mediation is terminated or effectively withdraws from it. The period shall in any event extend for at least one month from the date when it resumes running, except when it concerns a period within which an action must be brought to prevent that a provisional or similar measure ceases to have effect or is revoked.

Article 8 – Implementing provisions

The Commission shall publish information on the competent courts and authorities communicated by the Member States pursuant to Article 5(2).

Article 9 - Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 September 2007 at the latest. They shall forthwith inform the Commission thereof.

2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 10 – Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 11 - Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*