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COMMISSION STAFF WORKING PAPER

Annex to the

Proposal for a directive of the European Parliament and of the Council

on certain aspects of mediation in civil and commercial matters

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1. INTRODUCTION

This working paper forms an annex to the Commission's proposal for a directive on certain aspects of mediation in civil and commercial matters and provides further explanations on the background to the proposal, including the consultations with the public that preceded it, and also provides further explanations on the individual provisions of the proposal in the article-by-article commentary.

1.1. Background

With the entry into force of the Treaty of Amsterdam the European Union has set itself the objective of establishing an area of freedom, security and justice where the free movement of persons is ensured. The Tampere European Council of 1999 called for, in relation to better access to justice in Europe, alternative, extra-judicial procedures to be created by Member States.

The Council adopted conclusions on alternative methods of settling disputes under civil and commercial law in 2000. The Council considered 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. The Council invited the Commission to present a Green Paper taking stock of the existing situation and initiating wide-ranging consultation to prepare the measures to be taken.

1.2. Other Community provisions on alternative dispute resolution (ADR) and consistency with other policies

Since the entry into force of the Amsterdam Treaty the Community has adopted a series of legislative instruments to create a European area of civil justice with the principle of mutual recognition at the forefront. This proposal situates itself in this context, seeking to supplement the Community's policy on ensuring access to justice in judicial proceedings with measures pursuing the same objective in relation to extra-judicial procedures.

A large number of Community acts call for the promotion of extra-judicial procedures for the solution of disputes arising under their application, such as the recently adopted Brussels IIbis Regulation on matrimonial matters and parental

responsibility[1] as well as in the field of the internal market. Two recommendations have been adopted by the Commission in the context of consumer policy.[2] The Community has not yet taken any initiative that focuses on the very framework conditions for the development of mediation in general and the link between mediation and judicial proceedings in particular. This proposal will support the implementation of other Community acts by further promoting the use of ADRs and improving the legal framework for such dispute resolution methods in the EU.

1.3. Consultations with interested parties

1.3.1. The Green paper of 2002 – outcome and follow-up consultations

The Commission responded to the invitation of the Council of 2000 by presenting a Green Paper[3] on alternative dispute resolution in civil and commercial law on 19 April 2002. The Green Paper pursued the two objectives suggested by the Council: taking stock of the existing situation at national, European and International level, building in part on the study undertaken by the Council, and launching a wide consultation on possible measures to be taken at Community level. The Green Paper attracted substantial interest from Member States and other countries, mediation organisations, professional associations and researchers and other groups. Around 160 replies were received, and following the expiry of the consultation period the Commission organised a public hearing in February 2003 to further debate the issues raised, which was attended by some 130 persons.

The following points can be highlighted from the replies:

– The practically unanimous agreement as to the value of ADRs as a dispute resolution method and as to the potential to develop its use further;

– The rapid developments seen at national as well as at international level in this field, in terms of market-driven developments as well as regulatory and/or policy initiatives from governments and international organisations;

– A widely shared view that the Community could and should take measures to further stimulate the use of ADRs in the EU, but widely differing views as to exactly what measures should be taken.

The latter concerned especially the possibility of legislation at Community level on the mediation process as such and on the role of mediators. Some respondents cautioned against any legislative initiative on these issues, considering that it would threaten some of the distinguishing features of mediation such as its flexibility and scope for private autonomy. Others considered that a harmonised European mediation procedure would be beneficial for the further development of mediation,

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1 Council Regulation (EC) No 2201/2003 of 27 November 2003. OJ L 338, 23.12.2003, p. 1.

2 Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115, 17.4.1998, p. 31) and 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).

3 COM (2002) 196 final. 19.04.2002.

especially in order to increase confidence in the use of mediation in cross-border situations.

The European Parliament welcomed the Green Paper stressing the potential value and advantages of ADRs. It advised the Commission to adopt a cautious approach and prepare carefully any legislative initiatives, and to promote self-regulatory initiatives and avoid any approach which would reduce the flexibility of the process and the autonomy of the parties.

A preliminary draft of this proposal was made available on the internet for a second public consultation during the spring 2004. Some 30 comments were received from similar groups as responded to the Green Paper. The same draft text was used for the purpose of an expert meeting with Member State representatives in May.

1.3.2. Other follow-up initiatives to the Green Paper – a European code of conduct

Besides the preparation of this proposal the Commission has also organised a number of meetings with stakeholders to stimulate self-regulation of mediation in Europe, which have resulted in the development of a first code of conduct for mediation in the EU. The work on the code of conduct was finalised in July 2004 and the code has been made available on the Commission's website in order to promote its take-up and use by practitioners. The code could serve to raise the quality of mediation in the EU as well as to spread best practices between the Member States. The code has been developed for purely self-regulatory purposes only and does not represent the position of the Commission. The Commission is not taking any responsibility for monitoring the respect of the principles contained in it.

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 mediator or organisation concerned by the recommendation respect the principles of the recommendation.

2. COMMENTS ON THE MAIN PROVISIONS

Article 2 defines "mediation" and "mediator" for the purposes of this directive. The intention is to aim for a wide application of the directive and the definitions have therefore been left rather general. A second intention has been to avoid introducing subjective elements, since the application of the directive to a given situation should be triggered by the nature of the process in question and not by who has acted as a mediator and how. No reference is therefore made to qualifying criteria such as the independence or neutrality of the mediator. Adjudicatory processes are excluded from the scope, and so are also processes where the third party issues a recommendation, be it binding or not, on the resolution of the dispute. Attempts made by the judge to conciliate the parties in the context of civil proceedings are excluded also, since those attempts rather form part of the case management techniques available to the judge and since most of the substantive provisions of the

[4] See footnote 2.

directive are not relevant for that situation. On the contrary court-annexed mediation schemes, where mediation can be conducted by another judge of the same court, are covered.

The purpose of **Article 3** is to ensure that the parties, as a general rule, consider the possibility of using mediation for solving the dispute. The parties retain the right to decide whether to actually have recourse to mediation or not, since the article does not introduce any obligation. However, the court shall have the right to oblige the parties to attend an information session on what mediation is all about, for example, in cases where the court considers that the dispute as such would be suitable for mediation but it appears that the parties reject this possibility due to a lack of knowledge of mediation. The provision of information sessions themselves is the responsibility of the Member States. While the proposed directive does not make mediation compulsory it does not exclude the possibility for Member States to provide for such rules, provided they do not impede on any of the parties' right to access to the judicial system, especially in cross-border situations.

In view of the other provisions of the proposed directive certain measures are necessary as concerns the quality of mediation services offered in the Community. The proposed directive leaves a large degree of freedom to the Member States as to how the provision of quality mediation services should be ensured. **Article 4** puts emphasis on the promotion of self-regulation, which the Commission, at this stage, has found to be the most appropriate policy instrument for this purpose. As explained above the Commission has already sought to stimulate the development of a European code of conduct for mediators, and it will continue to see what further measures could be taken to contribute to the implementation of this Article.

As concerns **Article 5**, the possibility to enforce settlement agreements have been subject to discussion even before the Green paper was launched, notably in relation to the negotiations of the Bruxelles I Regulation. The issue at hand concerns the direct enforcement of a settlement through use of the enforcement procedures available in the Member State where enforcement is sought, and not the question of whether the settlement is to be regarded as enforceable in the sense of a binding contract on a matter which is amenable to an amicable out-of-court settlement.

The possibility for rendering a settlement agreement enforceable already exists in a number of Member States: either by submitting the agreement to a notary to have it confirmed in an authentic instrument, or by submitting it to a court, in spite of that the dispute has been extinguished, for a specific procedure usually referred to as *homologation*, whereby the agreement is rendered enforceable in the same way as a judgment. In family law matters similar possibilities exists in certain Member States involving other public authorities or courts.

Both procedures result in that the settlement agreement can be recognised and enforced in another Member State under other Community instruments, within their respective scope. A settlement agreement will, following a *homologation* procedure, be enforceable in accordance with the Regulation establishing a European Enforcement Order without the need for any intermediate proceedings in the Member State of enforcement. The same applies for an authentic instrument, which in addition could be enforced under the Brussels I Regulation also. The recognition and enforcement of settlements falling within the scope of the Brussels IIbis Regulation

is expressly foreseen by that regulation (which foresees also the recognition and enforcement of settlement agreements considered enforceable under national law even without having been approved or confirmed by a public authority or court).

The possibility for making settlement agreements enforceable is of particular interest in cross-border situations, where the non-respect of a settlement agreement may force the parties to launch judicial proceedings in another Member State. The possibility to prevent this risk by rendering the settlement enforceable directly after the mediation can therefore be very valuable for the parties and help put mediation on an equal footing with judicial proceedings as an effective dispute resolution method.

The proposed directive therefore foresees that such a possibility shall be put in place in all Member States. This solution has been preferred since the conferment of enforceability should always rest with a public authority and not flow directly from any requirements of form or process.

Member States may choose whether, for example, all courts or certain courts only should be competent for receiving such a request. Where this possibility already exists – such as in Member States with a notary system or where the *homologation* procedure is already in place - there is no need for further implementing measures.

Regarding **Article 6**, it must be stressed that the possibility for the parties to agree on the confidentiality of the process belongs to the key advantages of mediation, and can be vital for the effectiveness of the process itself. There are however certain limits to which an agreement of the parties, and a commitment of the mediator, can effectively protect confidentiality. This is notably the case in subsequent judicial proceedings, where the court may not respect the agreement of confidentiality and consequently admit, for example, the mediator to be heard as a witness. This is due to the basic rule of civil procedure found in most Member States that any evidence may be brought forward by the parties, provided it is relevant for the case, and that persons called to testify are under an obligation to do so by law.

While the parties may make use of contractual remedies in case one of them does not respect the confidentiality of the mediation this can be regarded as an insufficient sanction if the mediator is called as a witness by one of the parties. A further justification for such provisions is the need to provide a level playing field for mediators. Some mediators belong to regulated professions who are bound by professional secrecy, while others do not. This gives an unfair competitive advantage to the former group, and therefore calls for specific provisions to be introduced to protect certain aspects of the confidentiality of the process regardless of the profession of the mediator.

The protection of confidentiality outside any subsequent judicial proceedings does not call for a regulatory intervention. It is purely a question of a contractual rule, which would be made mandatory if it were to be laid down in law (possibly subject to if the parties have agreed otherwise), and there is not sufficient public interest to establish binding rules on this issue at Community level.

The article has been modelled upon the corresponding provision of the UNCITRAL model law on commercial conciliation, which not only provides a good model in

itself but also allows for promoting consistency between different rules on mediation. In particular, the construction chosen with an enumeration of specific points which are covered by the confidentiality, instead of a more generic rule, is more appropriate having regard to the unregulated nature of mediation and the mediator. It should be recalled that the directive, and consequently this provision, only applies in civil matters and evidence from the mediator would therefore be admissible in criminal proceedings. An exception has been provided for as concerns the interpretation and enforcement of a settlement agreement. This may involve questions concerning the validity of the settlement agreement or its compliance with national law if enforceability is sought, and a court or authority seized with such questions must be able to rely on evidence from the mediator to make a proper assessment of the case. Further exceptions for overriding considerations of public policy can be made, where the most important examples have been spelled out in the Article.

The aim of **Article 7** is to ensure that the decision of the parties to use mediation will not detract from or diminish their possibilities to launch judicial proceedings at a later stage, should the mediation fail or should one of the parties realise that mediation was not an appropriate dispute resolution method in a particular case. To retain this possibility to the full it is therefore necessary that any limitation periods do not continue to run when the mediation is on-going. This should also avoid that the parties launch judicial proceedings at the same time for no other reason than to stop the limitation period from running, which may be counterproductive for an amicable resolution of the dispute itself or represent a potential waste of resources of the competent court, which may never be called upon to decide the case.

It should be noted that the provision will require the agreement of both parties to operate, since both parties must agree on the use of mediation in the first place. On the other hand one party can unilaterally terminate the mediation, in view of its voluntary nature, and thereby allow the limitation period to resume. In this light the risk of abuse of the provision for tactical reasons is less than the risk of abuse in its absence.