

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects of mediation in civil and commercial matters

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 Article 67(5), *second indent*, thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

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 *principle of access to justice is fundamental and, with a view to facilitating better access to justice, the* European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by *the* Member States.

¹ OJ C , , p. .

² OJ C , , p. .

- (3) **In May 2000** the Council adopted conclusions on alternative methods of settling disputes under civil and commercial law 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) **In 2002** the European Commission presented a Green paper taking stock of the existing situation as concerns **alternative dispute resolution methods** (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 **securing** 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 judicial as well as extrajudicial dispute resolution methods. This **Directive** should contribute to the proper functioning of the internal market, in particular as concerns the **availability** of mediation services.
- (6) Mediation can provide a cost-**effective** and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. **Agreements resulting from** mediation are more likely to be **complied with** 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) To promote the use of mediation further and to ensure that parties having recourse to mediation can rely on a predictable legal framework, **it is necessary to introduce framework legislation addressing in particular key aspects of civil procedure.**
- (8) *(ex 9a) The provisions of this Directive should only apply to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.*
- (9) **(new) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.**

- (10) (ex 8) This **Directive** should apply to processes where two or more parties to a cross-border dispute **attempt themselves on a voluntary basis** to reach an amicable agreement on the settlement of their dispute **with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations which the parties are not free to decide on themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and labour law.**
- (11) (ex 8a) *This Directive should not apply to pre-contractual negotiations nor to processes of an adjudicatory nature such as **certain judicial conciliation schemes**, consumer complaint schemes, arbitration and expert determination or to processes administered by **persons or bodies** issuing a formal recommendation, be it legally binding or not, as to the resolution of the dispute.*
- (12) (ex 8b) *This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, insofar as a judge may act as a mediator under national law, it should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. It should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seised requests assistance or advice from a competent person.*
- (13) (ex 8c) *The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to mediation whenever this is appropriate.*

(13aa) (in part ex 13, in part new) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Neither should anything in this Directive prejudice existing self-regulating mediation systems insofar as these deal with aspects which are not covered by this Directive.

(13a) (new) In order to provide legal certainty this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(14) (ex 12) To ensure the necessary **mutual** trust **with** respect **to** confidentiality, **effect on** limitation **and prescription** periods, and recognition and enforcement of agreements **resulting from mediation**, **Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of** effective quality control mechanisms concerning the provision of mediation services.

(15) (ex 13) **Member States should define such** mechanisms, which may include having recourse to market-based solutions, **and should not be required to provide any funding in that respect. The mechanisms should** aim at preserving the flexibility of the mediation process and the autonomy of the parties **and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators** which should also be made available to the general public on the internet.

- (16) (ex 14) In the field of consumer protection, the Commission adopted in 2001 a formal recommendation¹ establishing minimum quality criteria **which** out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations concerned by that Recommendation should be encouraged to respect its principles. In order to **facilitate** the dissemination of information concerning **such** bodies, the Commission **should set** up a database of out-of-court schemes **which** Member States consider as respecting the principles of **that** Recommendation.
- (17) (ex 10) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that **compliance with** agreements *resulting from mediation would depend* on the good will of the parties. Member States should therefore ensure that *the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to render an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was unenforceable by nature.*
- (18) (ex 11) *The content of an agreement resulting from mediation which has been rendered enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community law or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters² or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility³.*

¹ 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).

² *OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).*

³ *OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1).*

- (19) (ex 11a) *Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties must be enforceable in the Member State in which they were concluded. This Directive should therefore not, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, encourage the parties to circumvent the law of that Member State by having their agreement rendered enforceable in another Member State.*
- (20) (new) *This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.*
- (21) (ex 9) *Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of the mediation in any subsequent civil and commercial judicial proceedings or arbitration.*
- (22) (new) **In order to encourage the parties to use mediation Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected.**

- (23) (ex 14a) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.**
- (23a) (new) In accordance with point 34 of the interinstitutional agreement on better law-making¹, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.**
- (24) (ex 15) This Directive seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union.**
- (25) (ex 16) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale **or** 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.
- (26) (ex 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 to 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.
- (27) (ex 18) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

¹ OJ C 321, 31.12.2003, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to **alternative** dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.
2. This Directive shall apply, **in cross-border disputes, to** civil and commercial matters except for such rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or **to** the liability of the State for acts and omissions in the exercise of State authority ("acta **j**ure imperii").
3. In this Directive, **the term** "Member State" shall mean Member States with the exception of Denmark.

Article 1a
Cross-border disputes

1. *For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:*
 - (a) the parties agree to use mediation after the dispute has arisen, or*
 - (b) mediation is ordered by a court, or*
 - (c) an obligation to use mediation arises under national law, or*
 - (d) for the purposes of Article 3 an invitation is made to the parties.*

2. *Notwithstanding paragraph 1, for the purposes of Articles 6 and 7 a cross-border dispute shall also be one in which judicial proceedings or arbitration following a mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).*

3. *For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.*

Article 2
Definitions

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

- (a) "Mediation" **shall mean** a structured process, however named or referred to, where two or more parties to a dispute attempt themselves *on a voluntary basis* to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process *may* be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings **concerning the dispute in question. It excludes** attempts made by the court or judge seised to settle a dispute *in* the course of judicial proceedings concerning **the dispute in question.**

- (b) "Mediator" **shall mean** any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way **in which** the third person has been appointed or requested to conduct the mediation.

Article 2a
Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of and adherence to voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.
2. Member States shall encourage the initial and further training of mediators in order to ensure that the conduct of a mediation is effective, impartial and competent in relation to the parties.

Article 3

Recourse to mediation

1. A court before which an action is brought may, when appropriate, and having regard to all **the** circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions *are held* and are easily available.
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 prevent **the** parties *from* exercising their right of access to the judicial system.

Article 4

Ensuring the quality of mediation

(See Article 2a)

Article 5

Enforceability of agreements resulting from mediation

1. Member States shall ensure that ***it is possible for*** the parties, or **for** one of them with the ***explicit*** consent of the others, to request that the content of a ***written*** agreement resulting from mediation ***be*** made enforceable. **The content of such an agreement shall be made enforceable, unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.**
- 1a. The content of the agreement can be rendered enforceable **by a court or other competent authority** in a judgment ***or*** decision or by an authentic instrument in accordance with the law of the Member State ***where the request is made***.
2. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 1a.
3. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of **an** agreement made enforceable in accordance with paragraph 1.

Article 6

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, ***unless the parties agree otherwise***, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation **process** except:
 - (a) **where this is necessary** for overriding considerations of public policy **of the Member State concerned**, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person, or
 - (b) where disclosure of the content of the agreement resulting from mediation is necessary to implement or enforce that agreement.
2. Nothing in ***paragraph 1 shall preclude*** Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 7

Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation **in an attempt** to settle a dispute are not **subsequently** prevented from initiating judicial proceedings **or arbitration in relation to that dispute** by the expiry of limitation or prescription **periods** during the mediation process.
2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription **periods** in international agreements to which Member States are party.

Article 7a

Information for the general public

Member States shall encourage, by any means which they consider appropriate, that information on how to contact mediators and organisations providing mediation services is available to the general public, in particular on the internet.

Article 8

Information on competent courts and authorities

The Commission shall **make the** information on the competent courts **or** authorities communicated by the Member States pursuant to Article 5(2) **publicly available through any appropriate means.**

Article 8a

Review

Not later than ...¹, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive **before** [...] ², with the exception of Article 8, for which the date of compliance shall be [...] ³ at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, **these measures** shall contain a reference to this Directive or **shall** be accompanied by such a reference on the occasion of their official publication. **The methods of making such reference shall be laid down by** Member States.

2. **Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.**

¹ *5 years after the implementation of this Directive.*

² *36 months after the adoption of this Directive.*

³ *30 months after the adoption of this Directive.*

Article 10
Entry into force

This Directive shall enter into force on the twentieth day following 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
The President

For the Council
The President
