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## **\*\*\*|** **REPORT**

on the proposal for a directive of the European Parliament and of the Council  
on certain aspects of mediation in civil and commercial matters  
(COM(2004)0718 – C6-0154/2004 – 2004/0251(COD))

Committee on Legal Affairs

Rapporteur: Arlene McCarthy

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2004)0718 – C6-0154/2004 – 2004/0251(COD))**

**(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2004)0718)<sup>1</sup>,
  - having regard to Article 251(2) and Articles 61(c) and 67(5) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0154/2004),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinion of the Committee on Civil Liberties, Justice and Home Affairs (A6-0074/2007),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

Text proposed by the Commission

Amendments by Parliament

Amendment 1  
Recital 2

(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.

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

Amendement 2  
Recital 5 a (new)

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<sup>1</sup> Not yet published in OJ.

***(5a) This Directive also applies to consumer mediation. Therefore the particularities of consumer mediation should be taken into account. In particular, it should incorporate the principles set out in Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes<sup>1</sup>.***

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<sup>1</sup> OJ L 109, 19.4.2001, p. 56.

#### *Justification*

*The current legislation on consumer mediation consists of two Commission recommendations setting out a number of principles which out-of-court bodies involved in consumer ADR should comply with (Recommendation 1998/257 and Recommendation 2001/310). Those principles are very important to ensure the success of consumer ADR. We therefore consider that the principles of transparency, impartiality, effectiveness and fairness included in Recommendation 2001/310 (consensual resolution of consumer disputes) should be incorporated in the proposed directive.*

#### Amendment 3

##### Recital 6

(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.

(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. ***Agreements resulting from*** 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.

*(This amendment applies to the entire legislative text under consideration; its adoption requires technical adaptations throughout the text.)*

#### Amendment 4

##### Recital 7 a (new)

*(7a) Member States are encouraged to apply the provisions of this Directive also to internal cases with a view notably to facilitating the proper functioning of the internal market. Moreover, the fact that the provisions of the Directive are expressed as being limited to cases having cross-border implications should not have the effect of limiting rules of national law that currently provide for the enforceability of agreements resulting from mediation, the confidentiality of mediation or the effect of mediation on limitation and prescription periods also in cases not covered by the Directive.*

Amendment 5  
Recital 8

(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.

(8) This *Directive* should cover processes where two or more parties to a *cross-border* dispute are assisted by a mediator to reach an amicable agreement on the settlement of the dispute, but exclude processes *such as pre-contractual negotiations or processes* of an adjudicatory nature such as arbitration, *judicial conciliation schemes, ombudsman* 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. *Cases where a court refers parties to mediation or in which national law prescribes mediation should also be covered, although the principle remains that mediation is a voluntary process and national legislation making the use of mediation compulsory or subject to incentives or sanctions should not prevent parties from exercising their right of access to the judicial system. Furthermore, mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute should also come within the scope of this Directive. Nevertheless, this Directive does not extend to attempts made by the court or judge seised to settle a dispute in the context of*

*judicial proceedings concerning that dispute or to cases in which the court or judge seised requests assistance or advice from a competent person.*

Amendment 6  
Recital 9

(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.

(9) *Given the importance of confidentiality in the mediation process, a* minimum degree of compatibility of civil procedural rules is necessary *with regard to* how the confidentiality of the *mediation is* protected in any subsequent *civil and commercial, judicial or arbitration* proceedings. The possibility for the court to *draw the parties' attention* to mediation should also be covered, while retaining the principle that mediation is a voluntary process. *It is also necessary to provide for a minimum degree of compatibility of civil procedural rules with regard to the effect of mediation on limitation and prescription periods.*

Amendment 7  
Recital 10

(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.

(10) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that agreements *reached by mediation* are *dependent* on the *goodwill* of the parties for their enforcement. It is therefore necessary to ensure that *parties to a written agreement reached in mediation may request that its content be made enforceable in so far as enforceability of such content is possible under the law of the Member State in which the request for enforcement is made. The content of such an agreement may be rendered enforceable* in a judgment *or* decision or *by an* authentic *act* by a court or *by another competent* authority *in accordance with the law of the*



*Member State where the request is made.*

Amendment 8

Recital 11

***(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.***

***(11) The content of a agreement reached by mediation which is rendered enforceable in a Member State will be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law, for example 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 matters<sup>1</sup> 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 responsibility<sup>2</sup>.***

<sup>1</sup> 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).

<sup>2</sup> 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).

Amendment 9

Recital 11 a (new)

***(11a) Although this Directive covers mediation in family law matters, it extends only to the rights available to the parties under the law of the Member State in which mediation takes place. Moreover, if the content of an agreement reached by mediation in family matters is not enforceable in the Member State where it was concluded and where its enforcement is sought, this Directive does not enable the parties to circumvent the law of that Member State by having the agreement rendered enforceable in another Member State, given that Regulation (EC) No 2201/2003 specifically provides that such***

*agreement must be enforceable in the Member State in which it was concluded.*

Amendment 10

Recital 13

(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.***

(13) These mechanisms and measures, which **should** 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 **should** encourage self-regulatory measures at Community level. ***For their part, the Member States should encourage and promote the application of the European Code of Conduct for Mediators, which the Commission will publish in the C Series of the Official Journal of the European Union, while ensuring that the quality of mediation is guaranteed by the criteria listed and defined in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes<sup>1</sup> and Commission Recommendation 2001/310/EC: impartiality, transparency, efficiency, fairness, representation, independence, adversarial procedure, legality and freedom. Likewise, in business-to-consumer mediation, the Member States should promote the application of the principles set out in Commission Recommendation 2001/310/EC. Furthermore, the Member States should encourage the development of a system of certification of national bodies offering training courses in mediation.***

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<sup>1</sup> OJ L 115, 17.4.1998, p. 31.

Amendment 11

Recital 17

(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.***

(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.

Amendment 12  
Article 1, paragraph 1

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.

1. The objective of this ***Directive*** is to facilitate access to dispute resolution ***and to promote the amicable settlement of disputes by encouraging*** the use of mediation and ensuring a ***balanced*** relationship between mediation and judicial proceedings.

Amendment 13  
Article 1, paragraph 2

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

2. This ***Directive*** shall apply in civil and commercial matters. ***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 iure imperii).***

Amendment 14  
Article 1, paragraph 3

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

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

Amendment 15  
Article 1 a (new)

*Article 1a*

*Scope*

**1. This Directive shall apply if, as at the date on which the parties agree to mediate, at least one of them is domiciled or habitually resident in a Member State other than the Member State of any other party.**

**2. Notwithstanding paragraph 1, Articles 6 and 7 of this Directive shall apply in relation to judicial proceedings following a mediation if, as at the date on which the parties agree to mediate, the court that would be seised in the event of any subsequent judicial proceedings would be in a Member State other than a Member State in which at least one of the parties is domiciled or habitually resident.**

**3. For the purposes of paragraphs 1 and 2, the Member State in which a party is domiciled or habitually resident shall be determined in accordance with Regulation (EC) No 44/2001 or Regulation (EC) No 2201/2003.**

Amendment 16  
Article 2, point (a)

(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.

(a) "Mediation" **means a structured** process **of a voluntary nature**, however named or referred to, where two or more parties to a dispute **attempt themselves** 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, **provided that the voluntary nature of mediation is respected**.

It **includes mediation conducted by a judge who is not responsible for any judicial proceedings in that dispute**. **However, it does** not include attempts made by the **court or judge seised** to settle a dispute within the

course of judicial proceedings concerning that dispute.

Amendment 17  
Article 2, point (b)

(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.

(b) "Mediator" *means* any third *person who is appointed in circumstances giving rise to a reasonable expectation that the mediation will be conducted in a professional, impartial and competent way*, regardless of the denomination or profession of that third *person* in the Member State concerned and of the way the third *person* has been appointed or requested to conduct the mediation.

Amendment 18  
Article 2 a (new)

*Article 2a*

*Quality of mediation*

*1. Member States shall, by any means which they consider to be appropriate, encourage 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 mediation is fair, effective, impartial and competent in relation to the parties and that the procedures are suited to the circumstances of the dispute.*

*3. Member States shall encourage the development of a system of certification for national bodies offering training courses in mediation.*

Amendment 19  
Article 3, paragraph 1

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.

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 ***also invite*** the parties to attend an information session on the use of mediation ***if such sessions are held and are easily available.***

Amendment 20  
Article 3, paragraph 2

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.***

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 parties from exercising their*** right of access to the judicial system.

Amendement 21  
Article 3, paragraph 2 a (new)

***2a. Mediation shall be a voluntary process.***

Amendment 22  
Article 4

***Article 4***

***deleted***

***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.**

Amendment 23  
Article 5, paragraph 1

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.

1. Member States shall ensure that **it is possible for** the parties, **or one of them with the explicit consent of the others, to request that the content of** a written agreement **resulting from a mediation be made enforceable to the extent that enforceability of the content of the agreement is possible under and** not contrary to **the** law of the Member State where the request is made.

Amendment 24  
Article 5, paragraph 1 a (new)

**1a. The content of the agreement may be made enforceable in a judgment or a decision or by an authentic act by a court or other competent authority in accordance with the law of the Member State where the request is made.**

Amendment 25  
Article 5, paragraph 2

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**.

2. Member States shall inform the Commission of the courts or **other** authorities that are competent **to receive** a request in accordance with **paragraphs 1 and 1a**.

Amendment 26  
Article 5, paragraph 2 a (new)

***2a. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of agreements reached by mediation which have been made enforceable in accordance with paragraph 1.***

Amendment 27  
Article 6

***Article 6***

***deleted***

***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.*

Amendment 28  
Article 6 a (new)

#### *Article 6a*

##### *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 parties nor those involved in the administration of the mediation process are entitled or compelled to disclose to third parties, or to give evidence in civil and commercial judicial proceedings or arbitration regarding, information arising out of or in connection with a mediation except:*

*(a) for overriding considerations of public policy or other substantial reasons, in particular where necessary in order to ensure the protection of the best interests of children or to prevent harm to the physical or mental integrity of a person; or  
(b) where disclosure is necessary in order to implement or enforce the agreement resulting from mediation.*

*2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.*

Amendment 29  
Article 7, paragraph 1

*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.*

*1. In order to ensure that parties who choose mediation with a view to resolving a dispute are not prevented from subsequently initiating judicial proceedings in relation to that dispute by the expiry of periods of limitation or prescription, Member States shall ensure that any such period does not expire between:*

*(a) the date when the parties agree in writing, after the dispute has arisen, to have recourse to mediation or, in the absence of such written agreement, the date on which they attend the first mediation meeting, or the date on which an obligation to resort to mediation arises under national law; and*

*(b) the date of an agreement reached in mediation, the date on which at least one of the parties informs the others in writing that mediation is terminated or, in the absence of such written notification, the date on which the mediator declares on his or her own initiative or at the request of at least one of the parties that mediation is terminated.*

Amendment 30  
Article 7, paragraph 2

*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.*

*2. Paragraph 1 shall be without prejudice to provisions on periods of limitation or prescription in international agreements to which Member States are parties which are not compatible with this Article.*

Amendment 31  
Article 7 a (new)

*Article 7a*

*Information for citizens*

*1. Member States shall ensure that information is available to citizens, in particular on Internet sites, on how to contact mediation providers and mediators as defined in Article 2, point (b).*

*2. Member States shall encourage legal practitioners to inform their clients about the possibility of mediation.*

Amendment 32  
Article 7 b (new)

*Article 7b*

*The European Code of Conduct for Mediators*

*The Commission shall publish the European Code of Conduct for Mediators in the C Series of the Official Journal of the European Union as a notice without*

*legal effects.*

*Justification*

*Whereas it is not the intention to attach any legal effects to the European Code of Conduct for Mediators, it is considered important to publicise it and make it readily accessible.*

Amendment 33  
Article 8 a (new)

*Article 8a*

*Review clause*

*Not later than ...\*, 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. If necessary, the report shall be accompanied by proposals to adapt this Directive. In particular, the report shall consider the impact of this Directive with regard to the development of mediation in both cross-border and internal cases. It shall further consider whether a proposal for an instrument for the further harmonisation of limitation and prescription periods is necessary to facilitate the proper functioning of the internal market.*

Amendment 34  
Article 9, paragraph 1

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**.

1. Member States shall bring into force the **necessary** laws, regulations and administrative **measures or ensure that the parties to mediation introduce the requisite measures through voluntary agreements, with the Member States adopting all the precautions needed in order to guarantee at all times that the results indicated in this Directive are achieved, in order** to comply with this Directive by **1 September 2008** at the latest, **with the exception of Article 8, for which the date of compliance shall be 1 September 2009**. They shall forthwith inform the Commission **of these measures**.

*Justification*

*It must be possible to implement the Directive through self-regulation.*

## EXPLANATORY STATEMENT

The rapporteur has always been convinced about the value and interest of alternative dispute resolution, in particular mediation. It affords a cheaper, quicker and less stressful alternative to court proceedings for citizens, without removing their right to their day in court as a last resort. It may also allow parties in dispute to remain in, or even improve, a valuable relationship, which the adversarial nature of litigation might jeopardise. It also allows for creative solutions which satisfy parties' real needs. For instance, in medical negligence cases, the injured party often wants an explanation and an apology just as much as he or she seeks compensation. The very nature of litigation is apt to frustrate those needs.

However, the rapporteur initially questioned the need for a directive at a time when mediation systems across the EU are still in an embryonic phase in some Member States. Moreover, in order to be effective, mediation must be flexible. Any attempt to "regulate" mediation could stifle its development. However, as a result of her on-line consultation and the evidence presented by the experts invited to the committee's hearing, the rapporteur recognises that there is overwhelming support for the principle of having a directive. She notes that even those experts who were sceptical about the directive or critical of its legal basis were enthusiastic about mediation as an alternative means of providing access to justice. Her objective therefore has been to create a workable, light-touch directive, which reflects existing guidelines and best practice and can serve to encourage the wider use of mediation across the EU. She would take this opportunity to thank the experts who took part in their hearing for their willingness to provide drafting suggestions after the hearing, some of which she has drawn upon in drafting the report.

In the amendments, the rapporteur has sought to clarify and improve on the original proposal, in particular by modifying the definitions of mediator and mediation. She is particularly concerned to ensure that quality standards are ensured, especially by including references to the European Code of Conduct for Mediators. She has amended the provisions on recognition and enforcement to make sure that they are legally watertight and respect the legal traditions of the various Member States. As far as confidentiality is concerned, the solution proposed offers a workable way of dealing with this question which affords Member States the latitude to adopt stricter rules if they consider this to be desirable.

As far as the question of legal basis is concerned, it would appear that a majority of Member States in the Council take the view that the proposed directive should be limited to cross-border cases on the ground that, under Article 65 of the EC Treaty, measures "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States" have to have "cross-border implications" and to be taken in so far as they are "necessary for the proper functioning of the internal market". The compromise which the rapporteur has put forward is designed to take into account Member States concerns' about the application of Article 65, while giving consumers and citizens in the internal market practical and user-friendly options to have access to a high standard of mediation across the EU. It is hoped that the Council will take a commonsense view of the benefits of mediation and that the directive can also be applied to domestic cases in Member States.

Lastly, the rapporteur commends this initiative insofar as it will serve to publicise and promote mediation as an alternative means of access to justice and afford a framework of common rules which are sufficiently robust to protect the parties' interests, yet light enough to allow market-driven solutions to emerge.

23.6.2005

## **OPINION OF THE COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

for the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters  
(COM(2004)0718 – C6-0154/2004 – 2004/0251(COD))

Draftsman: Johannes Blokland

### **SHORT JUSTIFICATION**

The European Council has repeatedly stressed the importance of alternative methods of resolving disputes. In 2000 the Council approved alternative methods of settling disputes under civil and commercial law. Article III-269(2)(g) of the draft Treaty establishing a Constitution for Europe explicitly lists alternative methods of dispute settlement among the powers of the Community and makes the development of alternative methods of dispute settlement an objective.

If developing alternative methods of dispute settlement is an objective, restraint must be exercised in adopting legislation on the subject. New legislation will restrict the development of an alternative to legal proceedings.

#### **The draftsman's view**

The draftsman considers that the Commission's arguments are insufficiently clear to justify a directive on mediation. He therefore proposes that the directive should apply only to international cases. This will avoid hampering the development of mediation as an alternative to legal proceedings in the Member States. Experiments with mediation would then have to comply with the requirements of the directive. The development of alternative methods of dispute settlement is on the agenda of Ministries of Home Affairs in several Member States, and Justice Ministries are also interested in it.

The definitions provided by the Commission in Article 2 are too broad. It is necessary to limit them so that mediation cannot be abused. The draftsman therefore opts, in line with the guidelines of international mediators' organisations, to require a mediation agreement to be concluded in writing and to have mediation conducted by a neutral mediation expert.



In addition to defining the quality of mediation, it is necessary to provide for an independent complaints procedure and independent disciplinary rules. If mediation is to become a fully-fledged alternative to legal proceedings, such instruments are essential.

Confidentiality is a feature of mediation. Article 6 links the requirements of confidentiality of the mediation to the possible bringing of a court action. In the draftsman's view, the confidentiality of mediation should also be mentioned in the heading. Moreover, not only statements and admissions during mediation should be treated as confidential. Behaviour displayed during mediation is also seen by experts as constituting evidence for proceedings. It is desirable to insert this in the directive.

The development of mediation in the Member States currently would not benefit from legislation. In amended form, this directive could help to generate confidence in mediation as an alternative to court action in international disputes.

## AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission<sup>1</sup>

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Amendments by Parliament

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### Amendment 1 Recital 10

(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.

(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 ***if legislation in the field of civil or commercial law does not provide for this.***

### *Justification*

*In some Member States, an agreement reached through mediation is legally valid without any court decision or instrument. It is therefore undesirable to compel all Member States to adopt this procedure.*

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<sup>1</sup> Not yet published in OJ.

Amendment 2  
Article 1, paragraph 1

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.

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

*Justification*

*The distinguishing feature of mediation is that both parties agree to it, and this should be specified.*

Amendment 3  
Article 2, point (a), subparagraph 1

(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.

(a) “Mediation” shall mean **a** process, however named or referred to, where two or more parties to a dispute **seek** to reach an agreement on the settlement of **their** dispute **through a mediator. This process may be** initiated by the parties, suggested or ordered by a court **with the consent of the parties** or **initiated pursuant to an obligation laid down** by the national law of a Member State.

*Justification*

*This definition states that the aim is to reach agreement through a mediator, whose job is not to 'assist' the parties. It also makes it clear that the mediation process must always have the consent of both parties. This is of essential importance to its success.*

Amendment 4  
Article 3, paragraph 1

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.

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 **ask** the parties to attend an information session on the use of mediation.

*Justification*

*The formulation in the original text exceeds the bounds of the framework-setting character of the proposal for a directive and violates the subsidiarity principle in respect of the courts. This amendment leaves open the possibility of formulating referrals.*

Amendment 5  
Article 4, paragraph 2

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.

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 conduct a mediation ***effectively, in a responsible manner and in accordance with the justified expectations of*** the parties.

*Justification*

*It is possible that parties to a mediation procedure may enter into it with completely opposite expectations. The text should therefore be amended to make provision for this criterion.*

Amendment 6  
Article 6, heading

***Admissibility of evidence in civil judicial proceedings***

***Confidentiality of the mediation procedure***

*Justification*

*In this article, the emphasis should be on the confidentiality of the mediation procedure. It follows that information obtained through mediation cannot be adduced as evidence in judicial proceedings. This also applies to administrative judicial proceedings, and is not confined to civil proceedings. The amendment to the heading applies to both.*

Amendment 7  
Article 6, paragraph 1, point (a)

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

***deleted***

*Justification*

*An invitation or offer by a party to end a dispute through mediation should not be covered by the provisions on the confidentiality of mediation.*



## PROCEDURE

<b>Title</b>	Mediation in civil and commercial matters			
<b>References</b>	COM(2004)0718 - C6-0154/2004 - 2004/0251(COD)			
<b>Date submitted to Parliament</b>	22.10.2004			
<b>Committee responsible</b> Date announced in plenary	JURI 27.10.2004			
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	LIBE 27.10.2004			
<b>Rapporteur(s)</b> Date appointed	Arlene McCarthy 24.11.2004			
<b>Discussed in committee</b>	21.6.2005	13.9.2005	31.1.2006	20.4.2006
	11.9.2006	3.10.2006		
<b>Date adopted</b>	20.3.2007			
<b>Result of final vote</b>	+: 26			
	-: 0			
	0:			
<b>Members present for the final vote</b>	Marek Aleksander Czarnecki, Cristian Dumitrescu, Monica Frassoni, Giuseppe Gargani, Klaus-Heiner Lehne, Katalin Lévai, Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega, Hartmut Nassauer, Aloyzas Sakalas, Francesco Enrico Speroni, Rainer Wieland, Jaroslav Zvěřina, Tadeusz Zwiefka			
<b>Substitute(s) present for the final vote</b>	Mogens N.J. Camre, Nicole Fontaine, Janelly Fourtou, Jean-Paul Gauzès, Kurt Lechner, Eva Lichtenberger, Arlene McCarthy, Marie Panayotopoulos-Cassiotou, Michel Rocard, Gabriele Stauner, József Szájer, Jacques Toubon			
<b>Substitute(s) under Rule 178(2) present for the final vote</b>	Toine Manders			