



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

from:	Presidency
to:	Committee on Civil Law Matters (mediation)
No. prev. doc.:	11523/05 JUSTCIV 151 CODEC 661
No. Cion prop.:	13852/04 JUSTCIV 159 CODEC 1161
Subject:	Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters

Delegations will find attached the text of the proposal for a Directive as amended by the Presidency to take account of both discussions at meetings of the Committee on Civil Law Matters (ADR) in September and October 2005 and delegations' written comments (see 7654/05 JUSTCIV 63 CODEC 200 + ADD).

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on certain aspects of mediation in civil and commercial matters

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to dispute resolution¹ **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 civil and commercial matters **except when certain such matters are excluded from mediation by the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters² or the liability of the State for acts and omissions in the exercise of State authority ("acta iure imperii").**
3. **In this Directive, "Member State" shall mean all Member States with the exception of Denmark.**

¹ Many delegations requested that the scope of the Directive be restricted to cross-border disputes (see also the opinion of the Council's Legal Service 15413/04 JUR 476 JUSTCIV 183 CODEC 1300).

² A recital shall indicate that the Directive covers family law and only the rights available to the parties under the law of the Member State in which mediation takes place.

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 to reach an agreement on the settlement of their dispute with the assistance of a mediator**. (...) This process **can be** initiated by the parties **or** suggested or ordered by a court **or prescribed** by the (...) law of a Member State.

It shall include **mediation conducted by a judge who is not responsible for any judicial proceedings in that dispute**. **However, it shall not include attempts made by the court or judge seised¹** to settle a dispute within the course of judicial proceedings concerning that dispute.

- (b) "Mediator" shall mean any third person ² **who is asked to conduct a mediation 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.

¹ A recital shall indicate that the exclusion from the Directive of attempts made by the court or judge seised during judicial proceedings includes also cases where the judge requests assistance or advice from a competent person.

² Note for translators: the word "tiers" should be translated as "third person" in English and as "dritte Person" in German.

Article 2a
*Ensuring the quality of mediation*¹

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 a mediation is effective, impartial and competent in relation to the parties.**
3. (...)

Article 3
Recourse 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 **also invite** the parties to attend an information session on the use of mediation **if such sessions exist 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 parties exercising their right of access to the judicial system.** (...) ²

¹ **A recital shall indicate that Member States shall not be required to fund the implementation of this provision.**

² **A recital shall emphasise the importance of the principle of access to justice.**

Article 4
Ensuring the quality of mediation
(See Article 2a)

Article 5
*Enforceability of settlement agreements*¹

- 1. Member States shall ensure that the parties, or one of them with the consent of the others, shall be able to request that a settlement agreement resulting from a mediation is made enforceable to the extent that the enforceability of the settlement agreement is possible under and not contrary to the law of the Member State where the request is made.**
- 1a The agreement can be rendered enforceable in a judgment, decision, authentic instrument or any other form by a court or other competent authority in accordance with the law of the requested Member State.**
- 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 settlement agreements which have been made enforceable in accordance with paragraph 1.**

¹ A recital will clarify that a settlement agreement declared enforceable in a Member State will be recognised and enforced in the other Member States in accordance with applicable Community or national law, for example on the basis of Brussels I or II a Regulations.

Article 6
*Confidentiality of mediation*¹

1. **Given that mediation is intended to take place in a manner which respects confidentiality, unless the parties agree otherwise, Member States shall ensure that 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 except:**
 - (a) **for overriding considerations of public policy, in particular when required to ensure the protection the best interests of children or to prevent harm to the physical or psychological integrity of a person; or**
 - (b) **where disclosure is necessary to implement or enforce the agreement resulting from mediation.**

2. **Nothing in the previous paragraph prevents Member States from enacting stricter measures to protect confidentiality of mediation.**

¹ **A recital will be included to express the importance of confidentiality in the mediation process.**

Article 7

Effect of mediation on limitation and prescription periods¹

1. **To ensure that parties who choose mediation to try to resolve a dispute are not prevented from initiating subsequent 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 to use 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 use mediation arises under national law; and**
 - (b) **the date of a settlement agreement, 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 own initiative or at the request of at least one of the parties that mediation is terminated.**
2. **Paragraph 1 shall be without prejudice to provisions on periods of limitation or prescription in international agreements to which Member States are parties, that are not compatible with this Article.**

¹ **A recital shall indicate that Article 7 leaves Member States free on the means to implement this provision, for example by suspension or interruption of limitation or prescription periods or by giving sufficient time to enable the parties to initiate subsequent judicial proceedings.**

Article 8
Implementing provisions

The Commission shall publish in the 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 [...] at the latest, **with the exception of Article 8, for which the date of compliance shall be [...] 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
The President

For the Council
The President

