

III

(Preparatory Acts)

COUNCIL

COMMON POSITION (EC) No 11/2008

adopted by the Council on 28 February 2008

with a view to adopting Directive 2008/.../EC of the European Parliament and of the Council of ...
on certain aspects of mediation in civil and commercial matter

(2008/C 122 E/01)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee ⁽¹⁾,Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

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 that end, the Community has 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.
- (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 April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union 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) In order to promote further the use of mediation and 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.

⁽¹⁾ OJ C 286, 17.11.2005, p. 1.⁽²⁾ Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129), Council Common Position of 28 February 2008 and Position of the European Parliament of ... (not yet published in the Official Journal).

- (8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.
- (9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.
- (10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by 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 on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.
- (11) This Directive should not apply to pre-contractual negotiations or 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, whether or not it be legally binding as to the resolution of the dispute.
- (12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive 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. This Directive should not, however, extend to attempts made by the court or judge seized to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seized requests assistance or advice from a competent person.
- (13) 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 the possibility of mediation whenever this is appropriate.
- (14) 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. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.
- (15) 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.
- (16) 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.
- (17) 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.
- (18) In the field of consumer protection, the Commission has adopted a Recommendation ⁽¹⁾ 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 coming within the scope of 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.
- (19) 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

⁽¹⁾ 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 (OJ L 109, 19.4.2001, p. 56).

for a Member State to refuse to make 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 by its nature unenforceable.

- (20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community 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 matters ⁽¹⁾ 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 ⁽²⁾.
- (21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, 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, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.
- (22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.
- (23) 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 mediation in any subsequent civil and commercial judicial proceedings or arbitration.
- (24) 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 by this Directive.

- (25) 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.
- (26) In accordance with point 34 of the Interinstitutional agreement on better law-making ⁽³⁾, 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.
- (27) 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.
- (28) Since the objective 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 that objective.
- (29) 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 given notice of their wish to take part in the adoption and application of this Directive.
- (30) 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,

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.

⁽¹⁾ 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).

⁽²⁾ 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).

⁽³⁾ OJ C 321, 31.12.2003, p. 1.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards 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 iure imperii*).

3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

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,
- (b) mediation is ordered by a court,
- (c) an obligation to use mediation arises under national law, or
- (d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following 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 3

Definitions

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

- (a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by 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 the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

- (b) 'Mediator' means 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 4

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 mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5

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 6

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.

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

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. 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 7

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 in order 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 8

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 9

Information for the general public

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

Article 10

Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11

Review

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. 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 12

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before ... (**), with the exception of Article 10, for which the date of compliance shall be ... (***) 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 reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

(*) 8 years after the date of adoption of this Directive.

(**) 3 years after the date of adoption of this Directive.

(***) 30 months after the date of adoption of this Directive.

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.

Article 14

Addressees

This Directive is addressed to the Member States.

Article 13

Entry into force

Done at ...

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

For the European Parliament

The President

...

For the Council

The President

...

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. The Commission submitted its proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters on 22 October 2004.
2. At its meeting on 1 and 2 December 2005 the Council (Justice and Home Affairs) took note of a common understanding reached within the Committee on Civil Law Matters (ADR) ⁽¹⁾.
3. The European Parliament adopted its first reading opinion on the proposal on 29 March 2007 ⁽²⁾.
4. The Committee on Civil Law Matters (ADR) examined the amendments of the European Parliament on 13 April 2007. In the light of that examination a consolidated version of the proposal was prepared which was subsequently discussed at a number of meetings and redrafted on a number of points.
5. On 3 October 2007 Coreper endorsed a compromise text ⁽³⁾ resulting from the discussions in the Committee as the starting point for negotiations with the European Parliament with a view to reaching an agreement at second reading.
6. During subsequent contacts with the European Parliament some amendments to the compromise text were agreed. At its meeting on 8 and 9 November 2007 the Council (Justice and Home Affairs) reached political agreement on this new text ⁽⁴⁾. The European Parliament confirmed on this occasion that it could accept the text.
7. The Council adopted its Common Position by unanimity on 28 February 2008.

II. ANALYSIS OF THE COMMON POSITION

8. The Council Common Position corresponds to the text of the political agreement from November 2007 which reflected the outcome of the negotiations between the Council, the Commission and the European Parliament following the adoption of the first reading opinion of the European Parliament.
 - A. **Amendments 1 to 11 concerning the recitals**
 9. The Council has taken over the substance of amendments 1-11 to the extent possible, but many have been redrafted and inserted in a different order to reflect the final wording and structure of the draft Directive.
 10. The Council has not accepted amendment 2, but has maintained in Recital 18 a reference to the Commission Recommendation mentioned in the amendment. Amendment 4 is reflected in Recital 8, but in a more succinct form. The last sentence of amendment 6 has been left out, as the Council has maintained the text of Article 7a of the common understanding from December 2005 (Article 8 of the Common Position). Amendment 10 has been incorporated in substance in Recital 17, but the specific references to Commission Recommendations have been left out and the same applies to the reference to the publishing of the European Code of Conduct for Mediators.
 11. The Council has inserted some new recitals in order to explain further certain aspects of the draft Directive. The Council has wanted to acknowledge that modern communication technologies are bound to be used increasingly in the mediation process and has therefore inserted Recital 9 dealing with this aspect. The Council has also wished to make it clear that the draft Directive does not lay down rules on enforcement and that the current rules in the Member States concerning enforcement therefore remain unaffected by the Directive (Recital 22). Finally, in order to abide by the Interinstitutional agreement on better lawmaking the Council has inserted Recital 26 encouraging the Member States to draw up correlation tables when implementing the Directive.

⁽¹⁾ 15043/05 JUSTCIV 217 CODEC 1102.

⁽²⁾ 8117/1/07 REV 1 CODEC 312 JUSTCIV 76.

⁽³⁾ 13290/07 JUSTCIV 243 CODEC 1000.

⁽⁴⁾ 14316/07 JUSTCIV 278 CODEC 1130.

B. Amendments 12 to 34 concerning the Articles

12. The Council has accepted amendments 12, 13 and 14 concerning Article 1 which to a large extent mirrored the text of the common understanding from December 2005. The suggested deletion of part of the first sentence of paragraph 2 has however not been accepted, but the exception has been worded in a different manner and the text of the Common Position now reads: 'except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law'. Furthermore, a clarification of the provision has been provided in Recital 10.
13. The Council has incorporated the substance of amendment 15 concerning a new Article on the cross-border nature of the Directive, but has redrafted the provision to some extent. It has also inserted a new recital (Recital 15) to clarify paragraph 1 further.
14. Amendments 16 and 17 are reflected in the text of the current Article 3. The Council has accepted to mention specifically in the text that the mediation process is of a voluntary nature and has also stressed this in Recital 13. Therefore the Council has considered it unnecessary to insert a new paragraph on this aspect as suggested by the European Parliament in amendment 21. As for the text of subparagraph (b) of the current Article 3 the Council has decided to maintain the text of its common understanding from December 2005 considering this text to make it sufficiently clear which requirements a mediator has to meet when conducting a mediation.
15. The Council has incorporated amendment 18 in Article 4 of the Common Position with the exception of the suggested paragraph 3 which the Council was unable to accept.
16. Amendments 19 and 20 concerning Article 3 (Article 5 of the Common Position) which corresponded to the text of the common understanding from December 2005 have been accepted in full. The same applies to amendments 22 and 27 which concerned deletion of provisions.
17. Amendments 23 to 26 concerning Article 5 (Article 6 of the Common Position) have been accepted by the Council with a slight redrafting of paragraph 1 to make the text clearer.
18. As for amendment 28 the Council has accepted the substantive part which is reflected in the text of Article 7 of the Common Position. The Council has however decided to maintain the provision as drafted in the common understanding from December 2005. This means that the Council has not accepted that it should also be impossible for parties to a mediation to disclose information concerning the mediation process and that the ban on disclosure should cover also disclosure to third parties. By maintaining the text of the common understanding the Council has also decided not to put the Member States under the obligation to ensure that those involved in a mediation process would not even have the right to give evidence.
19. The Council was unable to accept amendment 29 which in its view contained provisions which were too detailed for a Directive. It has therefore in Article 8 of the Common Position maintained the text of the common understanding from December 2005. However, in order to stress the importance of this provision and to meet the concerns of the European Parliament the Council has inserted a new recital (Recital 24) which makes it quite clear that Member States are put under an obligation of result by the provision. Amendment 30 concerning paragraph 2 of the same Article was accepted by the Council, but the last part of the provision was deemed unnecessary and therefore left out in the final text.
20. The Council has accepted amendment 31 which is reflected in the new Article 9 of the Common Position and in the corresponding recital (Recital 25).
21. Amendment 32 was rejected by the Council on the ground that it would be impossible to publish the European Code of Conduct for Mediators in the Official Journal since the Code of Conduct is not an officially adopted text. However, as mentioned in paragraph 10 the Council has inserted a reference to the Code of Conduct in Recital 17.

22. Amendment 33 containing a review clause has been accepted in substance by the Council, and such a provision now features in Article 11 of the Common Position, albeit in a different wording. The Council was unable to accept the last part of the suggested review clause concerning a harmonisation of limitation and prescription periods just as it was unable to accept amendment 29 concerning the Article on the same subject. This particular provision was part of the negotiations with the European Parliament and the current text has therefore already been agreed.
23. The Council was unable to accept amendment 34 since the suggested implementation through voluntary agreements would be impossible for legal reasons. However, to make it clear that existing self-regulating mediation systems can be maintained insofar as they deal with aspects which are not covered by the Directive a sentence to this effect was inserted in Recital 14. As for the dates for compliance with the Directive suggested in amendment 34 the Council has set different ones. Member States will now have 36 months from the date of adoption to comply with the Directive, but must communicate information on the competent court or authorities to the Commission within 30 months.

III. CONCLUSION

24. The Council considers its Common Position to be a well-balanced text which reflects faithfully the agreement reached with the European Parliament in the negotiations in October 2007.
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