

II

(Preparatory Acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

418th PLENARY SESSION, HELD ON 8 AND 9 JUNE 2005

Opinion of the European Economic and Social Committee 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) 718 final – 2004/0251 (COD))**(2005/C 286/01)*

On 16 November 2004, the Council decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 23 May 2005. The rapporteur was **Ms Sánchez Miguel**.

At its 418th plenary session, held on 8 and 9 June 2005 (meeting of 9 June), the European Economic and Social Committee adopted the following opinion by 157 votes to 1 with 1 abstention.

1. Introduction

and information networks are strengthened by means of the new technologies made available to the European public.

1.1 Since the Tampere Council of 15 and 16 October 1999, the European Commission has embarked upon a process to create and harmonise legal instruments making it possible to develop an area of freedom, security and justice, in which the free movement of persons is ensured, within the limits of the European Union. Previously ⁽¹⁾, the Council had presented relevant provisions to facilitate the service of judicial and extrajudicial documents between Member States, enhancing this measure by ensuring improved information for citizens.

1.2 As a result of the Tampere Council, the Commission has called on Member States to implement procedures to recognise and enforce the resolutions, along with alternative, out-of-court procedures for resolving disputes in civil and commercial matters, in order to improve the operation of judicial systems in every Member State, while European data-gathering systems

1.3 With regard to the first topic, the Council Regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ⁽²⁾ was submitted. Among other things, this provides for the simplification of the *exequatur* procedure, adaptations to the protective measures which will facilitate the enforcement of the resolutions, and the recognition of a writ of enforcement effective in Europe.

1.4 In a similar vein, the Commission presented a proposal for a Decision relating to the creation of a European Judicial Network in civil and commercial matters ⁽³⁾. This aims to set up a European instrument for judicial cooperation in order to inform private individuals, professionals, institutions and administrations about the laws and procedures applicable in each State, in civil and commercial matters, which would be particularly useful in settling cross-border disputes.

⁽¹⁾ See the Council Directive on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters [COM(1999)219 final]. EESC opinion, rapporteur: Mr B. Hernández Bataller. OJ C 368, 20.12.1999.

⁽²⁾ EESC opinion, rapporteur: Mr H. Malosse, OJ C 117, 26.4.2000.

⁽³⁾ COM(2000) 592 final. EESC opinion, rapporteur: Mr D. Retureau, OJ C 139, 11.5.2001.

1.5 Following the Commission's submission, in 2002, of the Green Paper examining an alternative approach to settling disputes in the EU, in which both Member States and interested parties were extensively consulted, the proposal for a directive now under discussion has been drawn up as a useful instrument designed to achieve effective results, while safeguarding the inherent characteristics of national law on dispute settlement in civil and commercial matters.

1.6 With regard to the above point, the practice of mediation in consumer matters⁽⁴⁾ is a useful precedent; over time it has proved very practical, partly due to its incorporation into consumer protection laws. This system has successfully adapted to new consumer habits, so that it can be applied to various areas involving services as well as goods.

1.7 Mediation in civil and commercial matters by means of judicial proceedings has certain characteristic features that make it quite distinct from other forms of mediation. Each State has sole responsibility for its judicial system and mediation is a valuable method for settling disputes only if the litigant parties consent to it. Both of these characteristic features impose constraints on the Commission's powers to flesh out a proposal for a Directive. Nevertheless, the aim is to provide alternative dispute-settlement practices, but, as the Commission points out, Member States must guarantee and maintain an 'effective and fair legal system' that meets the basic requirements for protection of human rights.

2. Substance of the proposal

2.1 The aim of this proposal for a directive is to facilitate, through mediation, the settlement of disputes in the field of civil and commercial law that may arise in the internal market. This involves defining the concept of mediation – and mediator – whilst leaving it to Member States to lay down the detailed judicial arrangements and, in particular, the characteristics required of mediators.

2.2 Mediation can be carried out voluntarily, at the request of the parties, or be initiated as a result of the legal proceedings. The request may therefore be made by the parties or by the courts. In both cases, the parties submit to mediation as a means of avoiding legal proceedings or, once these have begun, of simplifying them by complying with the results of the mediation. In both cases, the parties can call for the enforcement of the settlement reached by means of a judgment, decision or authentic instrument.

2.3 The content of the acts of mediation may not be used as evidence in the judicial proceedings in the cases set out in Article 6(1), thus protecting the confidentiality of the parties

and those involved in the mediation process. However, it may be used if the parties and the mediator agree and, especially, if this is to protect minors or prevent harm to the physical or psychological integrity of a person.

2.4 Periods of prescription or limitation applicable to actions resulting from the proceedings brought are suspended during mediation from the moment the parties or courts request it.

3. Comments on the proposal for a directive

3.1 The EESC believes that this initiative by the Commission is a useful instrument, which will further the actions undertaken at the Tampere Council to increase legal certainty in the EU. A European legal framework for civil and commercial mediation involves incorporating an instrument already in use in some Member States – albeit mainly in the private dispute settlement sphere – into judicial proceedings. This will provide a system enabling courts to propose a mediator external to the proceedings, thus making it easier to settle disputes by agreement between the parties.

3.2 The proposal for a directive aims to increase the use of mediation in judicial proceedings within the EU. This will bring advantages both in economic terms, by reducing the cost of proceedings, and in social terms, by shortening otherwise lengthy civil proceedings, which can have damaging consequences for the parties (particularly family law cases), with the ensuing social problems that litigants often face. At all events, mediation should not be confused with the conciliation procedures commonly used in most Member States before legal proceedings begin, as it is the parties and their lawyers, under the auspices of the judge, who will try to reach agreement in order to avoid proceedings.

3.3 The mediator is an important factor in achieving a good result. The trustworthiness and fairness of his or her handling of the matter and, most particularly, his or her independence in relation to the litigant parties, as well as his or her duty of professional secrecy during mediation, improve the mediation's effectiveness and make a positive outcome more likely. However, in Article 4 of the proposal, the conditions and requirements are left up to the Member States, with the emphasis on self-regulation at Community level, and particularly European codes of conduct. Although the proposal for a directive is not exclusively geared to mediation in cross-border disputes, there will be a need to train those appointed as mediators in Community law and, above all, to create a legal framework that ensures the availability of this service in all Member States.

⁽⁴⁾ 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.

3.4 In mediation, it is essential to guarantee the quality of the service rendered. Therefore, the proposal should contain guidelines for a basic harmonisation of requirements for practising as a mediator. The requirement for mediators to be competent and independent, in line with the recommendations for mediation in consumer matters would be one such prerequisite, and could be achieved through greater European cooperation aimed at more uniform mediator training and appointment systems.

3.5 Matters covered by mediation in civil and commercial law are defined in negative terms. Thus the eighth recital excludes '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'. This is presumably because there is a specific mediation procedure for each of the cases mentioned. However, we should not rule out the possibility of mediation in civil actions deriving from criminal or tax cases⁽⁵⁾ which, although originally excluded, could help these civil actions to be resolved.

3.6 The EESC agrees with the rule preserving the highest level of confidentiality of data, both civil and commercial, handled during the mediation process (Article 6(1)), as regards both personal data and those aspects concerning the confidentiality of relations; however, under no circumstances may the exclusion of such data as evidence be invoked if the rights of minors or the physical or psychological integrity of persons involved in the dispute are thereby threatened.

4. Specific comments

Given that mediation is a voluntary dispute settlement procedure which can only work if both parties agree to participate and to accept the outcome, the future Directive should clarify some extremely important aspects, to ensure that this is a workable instrument and that it inspires confidence in the European public. To this end, the EESC considers that account should be taken of some of the following observations.

4.1 The proposed legal framework for mediation has limited power in civil and commercial matters⁽⁶⁾ but, despite the enormous volume of case law on matters covered by civil and

commercial law, Article 1(2) should establish the framework's scope and should not adopt the negative formula set out in recital (8). Furthermore, account should be taken of civil and commercial actions resulting from other areas, such as tax and administrative matters and even of civil actions resulting from criminal actions⁽⁷⁾.

4.1.1 In the future, in the light of the experience of mediation carried out in accordance with the proposal, the possibility could be considered of extending its scope to cover administrative and tax powers.

4.2 One potential problem arises from the differences between the various language versions of the proposal, which could complicate its transposition⁽⁸⁾. Account must be taken of the fact that the organisation of the judicial system falls within the sole competence of each Member State and that legal practices may thus vary from one State to another. It would have to be made clear that it is not only law courts that can recommend mediation but also judicial bodies and also that these should not be the only bodies with the right to ensure compliance with the mediation agreement. Any public body entitled under national legislation to carry out such action has the right to do so.

4.3 The EESC wishes to insist on the importance of the mediator throughout the process, in order to ensure that the proceedings are carried through and are effective. The Committee therefore considers that the Commission should propose guidelines that will guarantee both a degree of harmonisation between Member States and the authority and quality of mediators. The minimum requirements for mediators to be included under Article 4 should include the following:

— suitable qualification and training in the subjects of the mediation;

⁽⁷⁾ The EESC opinion (rapporteur: Mr Retureau, OJ C 139, 11.05.2001) referred in point 3.7 to the problem of defining the civil and commercial spheres, and called for 'the decision to make specific reference to the Court of Justice definitions. Since civil actions heard in the context of criminal and tax cases do not fall outside the scope of the proposal, and it is also possible that documents which cannot easily be defined in legal terms by the appropriate legal body may be requested, an indent along the following lines should be inserted in order to protect the rights of the parties involved: "the receiving agency shall define as flexibly as possible those documents whose legal character cannot be clearly assigned to either the civil or the commercial field, but which nevertheless have points in common with them".'

⁽⁸⁾ The German version of the proposed Directive frequently uses the term 'Streitschlichtung' (dispute resolution). Dispute resolution cannot be considered the same as mediation because the resultant decision is at the least a reasoned proposal by the arbitrator aimed at resolving the conflict, while a mediator traditionally does not adopt any position as to the substance of the conflict. Consequently the German version of the draft Directive should use the term 'amicable settlement' instead of 'dispute resolution'.

⁽⁵⁾ Opinion CESE, point 3.7, rapporteur: Mr D. Retureau, OJ C 139, 11.5.2001.

⁽⁶⁾ The Brussels Convention of 27 September specified the scope of jurisdiction in civil and commercial matters.

- independence and impartiality in relation to the litigant parties;
- transparency and accountability in their actions.

In particular, the freedom to provide services should be guaranteed in all Member States, which would, in smaller countries, ensure the independence of the mediator with regard to the parties involved.

4.3.1 The Committee broadly welcomes the option of a European code of conduct as a means of setting the rules for mediators, although for this code to be valid, the Commission – the relevant body in this case – would have to consider the fact that the professionalism, independence and accountability

of persons, both natural and legal, practising as mediators should always be guaranteed as proposed in relation to Article 4.

4.4 Depending on the specific judicial characteristics of each State, the problem posed by the cost of mediation cannot simply be solved by including this in the general court costs. There should be a requirement either for tariffs in proportion to the issue in question and its scale or, alternatively, a mandatory advance payment that would enable the parties to decide whether or not it was worthwhile proceeding. In any event, the procedure should never be more costly to the parties than judicial proceedings.

Brussels, 9 June 2005.

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND

Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems

(COM(2004) 737 final – 2004/0258 (COD))

(2005/C 286/02)

On 15 December 2004, the Council decided to consult the European Economic and Social Committee, under Article 251 of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 23 May 2005. The rapporteur was **Mr Braghin**.

At its 418th plenary session, held on 8 and 9 June 2005 (meeting of 8 June), the European Economic and Social Committee adopted the following opinion by 64 votes to one with one abstention.

1. Gist of the opinion

1.1 The EESC endorses the European Commission's proposal, which aims to implement the Decision that was adopted by the WTO General Council on 30 August 2003. It also appreciates the Commission's active role – with international bodies and other stakeholders – in seeking appropriate solutions to the serious health problems affecting developing countries with no pharmaceuticals production capacity and inadequate health structures.

1.2 The EESC supports both the procedure governing the compulsory licensing of pharmaceutical products covered by a patent or a supplementary protection certificate and the chosen control arrangements.

1.3 Furthermore, the EESC recommends strengthening the operational provisions in order to ensure:

- full compliance with current legislation, particularly in relation to production quality control,
- that the conditions for compulsory licensing are reinforced (Article 8), particularly in relation to the arrangements used to differentiate between a licensed pharmaceutical product and its original, in order that illegal re-export within the EU or to third countries is avoided,
- a coordinated effort with the authorities of the importing countries in order to avoid fraud, counterfeiting and uses other than those originally provided for,