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THE EUROPEAN UNION**

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JUSTCIV 76**

INFORMATION NOTE

Subject : Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters
 - Outcome of the European Parliament's first reading
 (Brussels, 28 to 29 March 2007)

I. INTRODUCTION

The rapporteur, Mme McCARTHY (PSE/UK) presented a report containing 33 amendments to the proposed Directive, on behalf of the Committee on Legal Affairs.

Before the vote the rapporteur explained to the plenary that it had not been possible to schedule a debate on the report presented. Such report was voted because she wanted to open discussions with the Council and the Commission. She added that the report did not represent the last word, and she reserved the right to reopen some of the compromises if necessary with the Council and the Commission to ensure that mediation truly works for the citizens and that the objectives are achieved.

II. VOTE

Pursuant to Rule 131 of the European Parliament's Rules of Procedure¹, Ms. Arlene McCARTHY (PSE/UK) report, on behalf of the Committee on Legal Affairs containing 33 amendments to the Commission's proposal, was subject to a single vote without debate.

The text of the European Parliament's legislative resolution is set out in Annex hereto.

¹ Rule 131 of the European Parliament's Rules of Procedure provides that a report adopted in Committee with fewer than one-tenth of the members of the committee voting against is placed on the plenary agenda for adoption without further amendment. The report is then subject to a single vote. A report placed on the agenda for vote without amendment is also subject to a vote without prior debate in plenary.

Mediation in civil and commercial matters ***I

European Parliament legislative resolution of 29 March 2007 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),
 - 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 the 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.

Amendment 2
Recital 5 a (new)

(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 disputes¹.

¹ OJ L 109, 19.4.2001, p. 56.

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 this 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 this 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 ***resulting from mediation*** are *dependent* on the *goodwill* of the parties for their enforcement. It is therefore necessary to ensure that ***parties to a written agreement resulting from 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 an agreement resulting from 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 matters¹ 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 responsibility².

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).

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 resulting from 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 should 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 disputes¹ 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.**

¹ 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 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.

(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 *shall* not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute.

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 of 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 resulting from 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 resulting from 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.*
- 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.

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*.
