



CCBE

Représentant les avocats d'Europe
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**PRELIMINARY CCBE COMMENTS ON THE PRELIMINARY DRAFT
PROPOSAL FOR A DIRECTIVE ON CERTAIN ASPECTS OF MEDIATION
IN CIVIL AND COMMERCIAL MATTERS**

Conseil des Barreaux de l'Union européenne – Council of the Bars and Law Societies of the European Union

association internationale sans but lucratif

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Introduction

The Council of the Bars and Law Societies of the European Union (CCBE) is the representative body of 500,000 lawyers through its member bars and law societies. The CCBE has taken notice of the EU Commission's preliminary draft proposal for a mediation directive and will provide its preliminary comments as follows.

As pointed out in its Response to the Commission's Green Paper on Alternative Dispute Resolution in Civil and Commercial Law of April 19, 2002, Art. 3.7.1 of the Code of Conduct for Lawyers in the European Union states that a lawyer at all times shall strive to achieve the most cost effective resolution of the client's dispute and shall advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to ADR. Since the promotion of mediation within the EU Member States should facilitate the accomplishment of this goal, the CCBE welcomes the Commission's initiative.

The CCBE also wishes to praise the Commission for its work. The preliminary draft directive focuses on those key subjects which appear to be relevant for the further development of mediation in the European Union.

The CCBE expects the Draft Directive itself to be introduced by a Preamble. This Preamble may clarify that the objective of mediation is to facilitate the swift and economic resolution of civil and commercial disputes in full or in part. As facilitated negotiation, mediation is, therefore, another means of the parties to make use of their autonomy in civil and commercial law. The Preamble might further underline how lawyers can contribute to a speedy and swift resolution of disputes as advisors or neutrals, in particular, if a settlement is considered as an alternative to a resolution in judicial proceedings. Unless the Draft Directive is accompanied by separate guidelines, the Preamble might also clarify that the Directive shall not apply to Ombudsmen within organizations. It might also indicate that the EU's earlier regulations regarding consumer disputes continue to apply under specific circumstances.

The CCBE shall respectively submit the original text of the preliminary draft proposal as well as its proposal for an amendment and subsequently explain its submission by a brief comment.

Article 1- Objective and scope

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| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
| 1. The objective of this directive is to facilitate access to justice by promoting the use of mediation in civil and commercial matters and to ensure a sound articulation between mediation and judicial proceedings. | The objective of this directive is to facilitate access to justice by promoting the use of mediation in civil and commercial matters and to ensure a sound <i>interrelationship</i> between mediation and judicial proceedings as well as between mediation and arbitration or other means of adjudication. |
| 2. This directive shall apply in civil and commercial matters with the exception of (a) disputes which are not suitable for out-of-court settlements in accordance with the law applicable to the dispute in question, and (b) collective bargaining disputes related to employment contracts. | |

Comment

Whereas the word “*articulation*” in Art. 1.1 might be appropriate in French, native English speakers within the CCBE suggest to replace this term by the word “*interrelationship*”.

At least in the commercial world, parties frequently stipulate multi-step-dispute resolution clauses. Pursuant to these clauses, if no settlement is reached, mediation is followed either by litigation or by arbitration or some other means of adjudication. Moreover, certain statutes within the Member States (e.g. the Arbitration Act in the United Kingdom) refer to the statute of limitation. In order to make sure that the suspension of limitation that is provided for by Art. 7 of the preliminary draft directive applies to such other adjudicatory proceedings as arbitration as well, the CCBE proposes to supplement the current wording of Art. 1.1 by adding a reference not only to litigation, but also to arbitration.

Art. 1.2 provides for two exceptions with respect to the scope of the Directive. The CCBE proposes to delete these exceptions.

Regarding Art. 1.2 (a), one should distinguish between the opportunity to negotiate or mediate certain topics and the enforceability of a potential settlement. The inability to enforce certain settlements does not exclude the possibility to negotiate a settlement. For example, parties may not be able to stipulate a settlement regarding the validity of a patent in certain legal regimes. Nonetheless, parties may negotiate or mediate such dispute. Even though they could not themselves declare a patent as being valid or invalid, they could very well agree to withdraw or modify a motion to the competent authority as a result of their negotiations. Therefore, the private autonomy of the parties should not be limited by the missing authority to reach a settlement.

With respect to Art. 1.2 (b), the CCBE does not see any reason to exclude this type of dispute. Whereas special rules may apply in various legislations, it is difficult to see why

mediation should not be used in collective bargaining situations. Generally speaking, they are ideally suitable for resolution by mediation if the parties agree to make use of a third party.

Article 2 - Definitions

| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
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| <p>1. "Mediation" shall mean any procedure, 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 procedure is initiated by the parties, ordered by a court or prescribed by the national law of a Member State.</p> <p>It shall not include attempts made by the judge or the sitting court to settle a dispute within the course of judicial proceedings concerning the dispute.</p> | <p>1. "Mediation" shall mean any procedure, 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 procedure is initiated by the parties, <i>prescribed by a court or by the national law of a Member State.</i></p> <p>It shall not include attempts made by the judge or the sitting court to settle a dispute within the course of judicial proceedings concerning the dispute.</p> |
| <p>2. "Third-party" shall mean any person 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.</p> | <p>2. "Third-party" shall mean any person conducting a mediation, regardless of the denomination or profession of that third party in the Member State concerned, <i>subject to any national legislation,</i> and of the way the third party has been appointed or requested to conduct the mediation.</p> |

Comment

With respect to Art. 2.1, the CCBE suggests to replace the term “*ordered*” by the word “*prescribed by a court or the national law*”. Based on the comments by native speakers, his wording appears to provide for a broader coverage of various techniques of court referrals or suggestions.

Regarding Art. 2.2, the CCBE proposes to make a reservation regarding special requirements which may exist in the respective jurisdictions. For example, certain Member States appear to require specific professional qualifications for family mediators. Art. 2.2 might, therefore, include a reference that clarifies that certain professional requirements may be “*subject to any national legislation*”.

Article 3 - Referral to mediation

| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
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| <p>1. A court before which an action is brought shall, 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 shall in any event have the right to require the parties to attend an information session on the use of mediation.</p> | <p>1. A court before which an action is brought shall, 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 shall in any event have the right to require the parties to attend an information session on the use of mediation. <i>Mediators should be selected from the widest possible range of professions.</i></p> |
| <p>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.</p> | <p>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.</p> |

Comment

The CCBE welcomes the Commission's idea to provide for an information session. This requirement appears to be a pragmatic intermediate solution as compared to mandatory mediation programs or an ADR assessment duty that is accompanied by cost sanctions.

With respect to Art. 3.1, the CCBE suggests to add a third sentence. This addition should clarify that various professions may play a role within court-related ADR-programs. In addition to judges who may be designated as settlement judges, such other professionals as lawyers, psychologists or engineers should participate in such programs. By providing for the participation of other professions, the Directive would clarify that court settlement programs shall go beyond traditional settlement attempts during litigation.

Article 4 - Ensuring the quality of mediation

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| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
| 1. Member States shall promote effective quality control mechanisms concerning the provision of mediation services. | 1. Member States shall promote effective quality ... concerning the provision of mediation services. |
| 2. Member States shall promote and support the training of third parties in order to allow parties in dispute to choose a third party who will be able to effectively conduct a mediation in the manner expected by the parties. | 2. Member States shall promote and support the training of third parties in order to allow parties in dispute to choose a third party <i>who will be knowledgeable and experienced in dispute resolution procedures and able to effectively</i> conduct a mediation in the manner expected by the parties. |
| 3. In order to contribute to the implementation of paragraph 1 of this Article the Commission and the Member States shall promote and facilitate the development of and adherence to voluntary codes of conduct by third parties and providers of mediation services, at Community as well as at national level. | 3. In order to contribute to the implementation of paragraph 1 of this Article the Commission and the Member States shall promote and facilitate the development of and adherence to voluntary codes of conduct by third parties and providers of mediation services, at Community as well as at national level. |

Comment

The CCBE supports the Commission's interest in an improvement of mediation quality. At the same time, it is concerned that the obligation to establish "*control mechanisms*" might be counter-productive, create new bureaucracies and lead to over-regulation. Therefore, it suggests to delete the two terms "*control mechanism*" from Art. 4.1.

Moreover, given the Commission's goal to provide for a smooth interrelationship between mediation and adjudication, it might be useful to underline that professionals acting as third parties should be knowledgeable and experienced in dispute resolution proceedings. Therefore, the CCBE suggests to add the terms "*who will be knowledgeable and experienced in dispute resolution proceedings*" in Art. 4.2.

Article 5 - Enforcement of agreements

| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
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| <p>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 that renders the agreement enforceable under national law, provided that the agreement is considered as a binding contract in accordance with the applicable law to the agreement.</p> | <p>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 that renders the agreement enforceable under national law, provided that the agreement is considered as a binding contract in accordance with the applicable law to the agreement.</p> |
| <p>2. Member States shall designate one or more courts or public authorities competent for receiving a request in accordance with paragraph 1 and communicate that information to the Commission.</p> | <p>2. Member States shall, <i>where necessary</i>, designate one or more courts or public authorities competent for receiving a request in accordance with paragraph 1 and communicate that information to the Commission.</p> |

Comment

The CCBE welcomes the Commission’s intention to facilitate the enforcement of agreements. Since the enforcement systems vary broadly among Member States, not all Member States may need to designate a court or public authority. Therefore, Art. 5.2 might clarify that such designation only needs to be made “where necessary”.

As described in more detail in its response to the Green Paper, the CCBE is in favour of the enforceability of settlement agreements which are achieved with the assistance of lawyers. Such facilitated enforceability would clearly satisfy the preliminary draft directive’s goal to facilitate *access to justice*. Unfortunately, the current draft has missed this opportunity. It is also silent as to whether lawyer-assisted settlements could be included into the Brussels II Convention.

Article 6 - Confidentiality of mediation

| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
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| <p>1. Third parties, as well as any other third person involved in the administration of mediation services, shall not in judicial proceedings give testimony or evidence regarding any of the following, unless otherwise agreed by the parties:</p> <p>(a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;</p> <p>(b) Views expressed or suggestions made by a party in a mediation in respect of a possible settlement of the dispute;</p> <p>(c) Statements or admissions made by a party in the course of the mediation;</p> <p>(d) Proposals made by the third party;</p> <p>(e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the third party;</p> <p>(f) A document prepared solely for purposes of the mediation.</p> | <p>1. A party, third parties, as well as any other third person involved in the administration of mediation services, shall not in <i>arbitral</i>, judicial or similar proceedings give testimony or evidence regarding any of the following, unless otherwise agreed by the parties:</p> <p>(a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;</p> <p>(b) Views expressed or suggestions made by a party in a mediation in respect of a possible settlement of the dispute;</p> <p>(c) Statements or admissions made by a party in the course of the mediation;</p> <p>(d) Proposals made by the third party;</p> <p>(e) The fact that a party had indicated its willingness to accept a proposal for a settlement made by the third party;</p> <p>(f) A document prepared solely for purposes of the mediation.</p> |
| <p>2. Paragraph 1 of this Article applies irrespective of the form of the information or evidence referred to therein.</p> | <p>2. Paragraph 1 of this Article applies irrespective of the form of the information or evidence referred to therein.</p> |
| <p>3. The disclosure of the information referred to in paragraph 1 of this Article shall not be ordered by a court or other judicial authority and, if such information is offered as evidence in contravention of paragraph 1 of this Article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required for the purposes of implementation or enforcement of an agreement reached as a direct result of the mediation.</p> | <p>3. The disclosure of the information referred to in paragraph 1 of this Article shall not be ordered by a court, <i>arbitral tribunal</i> or other judicial authority and, if such information is offered as evidence in contravention of paragraph 1 of this Article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required for the purposes of implementation or enforcement of an agreement reached as a direct result of the mediation.</p> |
| <p>4. The provisions of paragraphs 1, 2 and 3 of this Article apply whether or not the proceedings relate to the dispute that is or was the subject matter of the mediation.</p> | <p>4. The provisions of paragraphs 1, 2 and 3 of this Article apply whether or not the proceedings relate to the dispute that is or was the subject matter of the mediation.</p> |
| <p>5. Subject to the limitations of paragraph 1 of this Article, evidence that is otherwise admissible in judicial proceedings does not become inadmissible as a consequence of having been used in a mediation.</p> | <p>5. Subject to the limitations of paragraph 1 of this Article, evidence that is otherwise admissible in judicial proceedings does not become inadmissible as a consequence of having been used in a mediation.</p> |

Comment

The CCBE welcomes the intention of the EU Commission to provide for limited, but specific protection of confidentiality. The CCBE notes that the confidentiality obligation does not apply to the parties. The CCBE also notes that it is not subject to disclosure requirements under national law.

Art. 6 contains a confidentiality obligation of the Third Party and other third persons with respect to certain information that may be exchanged in the context of mediation. As opposed to Art. 10 of the UNCITRAL Model Law on International Commercial Conciliation which covers the parties as well as third parties and persons, only the Third Party and other third persons are bound by this confidentiality obligation. Such partial protection is not sufficient. This solution would still permit the parties to exploit the information received in mediation in a subsequent litigation or arbitration. It could not serve the very purpose of a confidentiality protection because it would not serve as an incentive to share information, to frankly assess factual and legal arguments and to be open about settlement proposals. Therefore, the CCBE suggests that the protection should be extended to the parties. Their right to make different stipulations should not be affected.

Whereas the UNCITRAL Model Law includes references to arbitration, such references are missing in the preliminary draft directive. Given the interrelationship between mediation and arbitration as well as similar proceedings, corresponding references should be made in Art. 6.1 and 6.3.

Article 7 - Suspension of limitation periods

| Preliminary draft proposal by EU Commission | Preliminary draft proposal as amended by CCBE |
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| 1. The running of the limitation period regarding the claim that is the subject matter of the mediation shall be suspended or interrupted as of when, after the dispute has arisen, the parties agree to use mediation, the use of mediation is ordered by a court, or an obligation to use mediation arises under the national law of a Member State. | 1. The running of the limitation period regarding the claim that is the subject matter of the mediation shall be suspended or interrupted <i>for the duration of the mediation.</i> |
| 2. Where the mediation has ended without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement, counting from the date of a declaration of one or both of the parties or of the third party that the mediation is terminated. | 2. Where the mediation has ended without a settlement agreement, the limitation period resumes running from the time the mediation ended without a settlement agreement, counting from the date of a declaration of one or both of the parties or of the third party that the mediation is terminated. |

Comment

The CCBE acknowledges the intention of the Commission to provide for the suspension of limitation periods across all Member States while mediation is running.

In the brief available time, it was not possible to clarify whether the proposed Art. 7.1 could be implemented in all Member States. The CCBE, therefore, currently considers whether it might be more appropriate to leave the regulation of the preconditions for a suspension to Member States.