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CCBE POSITION ON THE PROPOSAL FOR A DIRECTIVE ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS

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Introduction

The Council of the Bars and Law Societies of Europe (CCBE), through the national Bars and Law Societies of the Member States of the European Union and the European Economic Area, is the representative body of more than 700,000 European lawyers.

The CCBE has examined the Commission's proposal for a Directive on certain aspects of mediation in civil and commercial matters.

The CCBE supports the Commission efforts in order to promote mediation and acknowledges the potential benefit of a Directive in this field. 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 CCBE 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 considers a Community instrument on issues, such as enforcement of agreements and confidentiality, as desirable in relation to cross-border aspects. At the same time, the CCBE does not see a need for the harmonization of rules regarding the referral to mediation (Article 3) and quality of mediation (Article 4). Besides, the CCBE would like to point out that Article 65 EC limits the competence of the European Union to measures in the field of judicial cooperation in civil matters having cross-border implications and that the competence in national mediation cases without any cross-border aspects should therefore remain exclusively with the Member States.

As pointed out in its preliminary comments on the preliminary draft proposal for a Directive on mediation, the CCBE would like the explanatory memorandum to acknowledge the role of lawyers in mediation. 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.

Finally, in relation to recital 14, it should be made clear that the principles laid down in existing rules in the field of consumer protection may not be extended to all civil and commercial disputes. Consumer disputes affect particular types of litigation. The principles applied to those disputes should not be generalised. As mentioned in the CCBE response to the ADR Green Paper, the EU recommendation regarding consumer rights (Recommendation 98/257/CE), in essence, deals with ADR systems in which the third party « *proposes or imposes a solution; it does not concern procedures that merely involve an attempt to bring the parties together to convince them to find a solution by common consent* » (Eighth Consideration). Since the latter is, however, the primary purpose of mediation and other means of dispute resolution, the principles contained in the recommendations are not necessarily transferable into any ADR system. Without a doubt, they seem quite adequate for ADR mechanisms, as envisaged in the Recommendations regarding consumer dispute settlement mechanisms that must lead to a binding or enforceable resolution of the dispute. Not all of them can, however, be reconciled with non-binding ADR systems, in particular with mediation. If the recommendations regarding consumer disputes would be applied to all disputes in civil and commercial law, the parties' private autonomy would be restricted rather than expanded.

The present document contains the CCBE comments on the main provisions of the draft Directive and includes amendment proposals. As in previous comments, it does not address the Commission's competence under the Treaty

Article 1 – Objective and scope

Proposal for a Directive on mediation	Amendments proposed by the CCBE
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 cross-border dispute resolution by promoting the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.
2. This directive shall apply in civil and commercial matters.	
3. In this directive, “Member State” shall mean Member States with the exception of Denmark.	

Comment:

The CCBE appreciates that the two exceptions included in the preliminary draft (i.e. disputes which are not suitable for out of court settlement and collective bargaining disputes related to employment contracts) were deleted from the draft Directive, as suggested by the CCBE.

Furthermore, as mentioned above in the introduction and given the limits of the competence of the European Union, the scope of the Directive should be limited to cross-border disputes.

Article 2 – Definitions

Proposal for a Directive on mediation	Amendments proposed by the CCBE
<p>For the purposes of this Directive the following definitions shall apply:</p> <p>(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.</p> <p>It shall not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute.</p> <p>(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.</p>	<p>For the purposes of this Directive the following definitions shall apply:</p> <p>(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.</p> <p>It shall not include attempts made by the court judge to settle a dispute. within the course of judicial proceedings concerning that dispute.</p> <p>(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.</p>

Comment:

The CCBE suggests that the draft Directive on mediation should be restricted to non judicial mediation. The CCBE has reservations in relation to mediation by judges since it can lead to conflicts of interest, in particular in relation to the protection of confidentiality within the court. More generally, considering the principle of private autonomy as well as the backlogs in the Courts which exist in many Member States and considering the judges' time constraints, the CCBE considers that the role of judges should be focused on their judicial function which is vital for the administration of justice.

Article 3 – Referral to mediation

Proposal for a Directive on mediation	Amendments proposed by the CCBE
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 in any event require the parties to attend an information session on the use of mediation. Mediators should be selected from the widest possible range of professions.
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 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.

Comment:

With respect to Article 3.1, the CCBE suggests to add a third sentence, as indicated. 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. For example in Austria, panels cover persons from many professions who qualified after a long and very strict process supervised by the Ministry of Justice. By providing for the participation of other professions, the Directive would clarify that court settlement programs shall go beyond traditional settlement attempts during litigation.

Mediation depends on a voluntary decision of the parties. Accordingly, there should be no mandatory information session prior to the beginning of a legal proceeding. Courts shall not be impeded to call the parties' attention to mediation. The reference to mediation must, however, not be mandatory in any way and shall not postpone or cause delay to the proceedings.

Article 4 – Ensuring the quality of mediation

Proposal for a Directive on mediation	Amendments proposed by the CCBE
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.	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.	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 knowledgeable and experienced in dispute resolution procedures and who will be able to effectively conduct a mediation in the manner expected by the parties.

Comment:

The CCBE is concerned that the obligation to establish “*control mechanisms*” might be counter-productive, create new bureaucracies and lead to over-regulation. Therefore, it suggests deleting the phrase “*as well as other effective quality control mechanisms concerning the provision of mediation services*” from Article 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 Article 4.2.

Article 5 – Enforcement of settlement agreements

Proposal for a Directive on mediation	Amendments proposed by the CCBE
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, 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 performing a public service that renders the agreement enforceable in a similar manner as a judgment under national law, provided that the agreement is not contrary to mandatory national law in the Member State where the request is made or to mandatory European law.
2. Member States shall inform the Commission of	2. Member States shall inform the Commission of

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the courts or public authorities that are competent for receiving a request in accordance with paragraph 1.

the courts or **public** authorities **performing a public service** that are competent for receiving a request in accordance with paragraph 1.

Comment:

The idea of a court control of settlements raises a number of questions. For example, it is already unclear whether Member States are asked to introduce national legislation that requires courts to assess whether a settlement agreement is in conformity with European law and national law, judged merely upon its own wording or based on the knowledge of the context of the dispute. Whatever the scope of such an examination is, the CCBE rejects the idea of a court control of privately negotiated settlements. If any such control had to be exercised, it must be limited to a violation of public policy standards or, at a maximum, of mandatory law provisions (whose violation would render the settlement void).

The CCBE welcomes the Commission's intention to facilitate the enforcement of agreements. However, the CCBE would like the Directive to go further and provide for the enforceability of settlement agreements which are achieved with the assistance of lawyers. Such facilitated enforceability would increase the attractiveness of this process to the parties and satisfy the preliminary draft directive's goal to facilitate *access to justice*.

The assistance of independent lawyers during the process under the guidance of a mediator freely chosen or accepted by the parties themselves, should be regarded as a sufficient guarantee that the agreement has been reached after due consideration of the parties' respective rights and duties. Hence, there is no need for the courts to review it further since this would, in effect, give the party who has changed its mind a chance to renege on its approval of a solution reached freely in circumstances that guarantee due process consideration.

Such "easy enforcement" and access to court recognition would enhance recourse to mediation as a means for settling disputes and should, therefore, be encouraged. The institute of the "Lawyers' Settlement" (Anwaltsvergleich) may serve as an example. In order to leave all possibilities open in this field, the CCBE suggests the following words to be added "authorities performing a public service" which would enable to include professions or institutions appointed on this purpose by national laws. The draft Directive is also silent as to whether lawyer assisted settlements could be included into the Brussels II Convention.

Article 6 – Admissibility of evidence in civil judicial proceedings

Proposal for a Directive on mediation	Amendments proposed by the CCBE
<p>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:</p> <ul style="list-style-type: none"> (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; 	<p>1. A party to the mediation proceedings, 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:</p> <ul style="list-style-type: none"> (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;

<p>(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.</p>	<p>(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.</p>
<p>2. Paragraph 1 shall apply irrespective of the form of the information or evidence referred to therein.</p>	<p>2. Paragraph 1 shall apply 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 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</p> <p>(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.</p>	<p>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</p> <p>(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.</p>
<p>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.</p>	<p>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.</p>
<p>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.</p>	<p>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.</p>

Comment:

As opposed to the UNCITRAL Model Law on International Commercial Conciliation, the confidentiality protection in Article 6 does not extend to the parties themselves: Article 10 of the UNCITRAL Model Law on International Commercial Conciliation covers the parties as well as mediators. However, Article 6 is limited to a confidentiality obligation of mediators and “any person involved in the administration of mediation services” with respect to certain information that may be exchanged in the context of mediation. The CCBE suggests to add a reference to the parties, as already embedded in Article 10 of the UNCITRAL Model Law. If the CCBE’s proposal for amendment was accepted by the Commission, Art. 6 would fully correspond to Art. 10 of the UNCITRAL Model Law.

The confidentiality obligation of article 6 concerns testimony or evidence given in civil judicial proceedings. In practice, there are very few cases where third parties would be called to testify. It is much more relevant to cover the documents which can be submitted by the parties. Thus, Article 6 covers a rare case, but not the majority of cases. 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

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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 (within the limits provided for by Art. 6). Their right to make different stipulations should not be affected.

Finally, whereas the UNCITRAL Model Law includes references to arbitration, such references are missing in the draft Directive. Given the interrelationship between mediation and arbitration as well as similar proceedings, corresponding references would need to be made in Article 6.

Article 7 – Suspension of limitation periods

Proposal for a Directive on mediation	Amendments proposed by the CCBE
<p>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:</p> <ul style="list-style-type: none"> (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. 	None
<p>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.</p>	

Comment:

The CCBE appreciates the intention of the Commission to provide for the suspension of limitation periods across all Member States while mediation is running, as suggested and supported by the CCBE.