

ASA comments on the proposed EU directive on certain aspects of mediation in civil and commercial matters published in Brussels 22nd October 2004



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1 Background

- 1.1 The EU Commission published a Green Paper in 2002, and received 160 replies (including one from ASA). The consensus was:
- There was “practically unanimous agreement” that ADRs were a valuable dispute resolution method
 - There is currently rapid market-driven development in ADR, followed by regulatory and policy initiatives from governments
 - The EU could and should “take measures to further stimulate the use of ADRs” but widely differing views were expressed about what measures to take
- 1.2 A mediator code of conduct has been developed by the commission, finalised in July 2004. This can be found on http://europa.eu.int/comm/justice_home/ejn/adr/adr_ec_code_conduct_en.pdf This has been developed for “self-regulatory purposes only” and the Commission is “not taking any responsibility for monitoring the respect of the principles contained in it”.
- 1.3 This draft directive was published in October 2004, and member states are currently consulting on it. It can be found on: http://www.ejtn.net/www/en/resources/5_1095_1230_file.458.pdf
- 1.4 The DCA has asked for a response from the advice sector.

2 The objectives of the EU directive

- 2.1 The objective is “better access to justice”, which includes “promoting access to adequate dispute resolution processes for individuals and business, and not just access to the judicial system”(1.1.1). The directive contributes to this by:
- Trying to establish minimum rules on the relationship between mediation and the courts – there are currently discrepancies between the rules in members states
 - Promoting mediation without making it compulsory
- 2.2 There are no regulatory measures included in the directive – the Commission encourages self-regulation initiatives (1.1.1).
- 2.3 There is an assumption that mediation is a “quicker, simpler and more cost-efficient way to solve disputes” with other benefits including “a greater chance of reaching an agreement which will be voluntarily respected” and preserving relationships (1.1.3). However, the Commission sees mediation as “one of several dispute resolution methods available in a modern society, and which may be the most suited for some, but certainly not all, disputes” (1.1.4).

3 Summary of the articles

Article 1 – objective

The directive applies to civil and commercial matters, and is intended to promote mediation, and ensure a “sound relationship between mediation and judicial proceedings”.

Article 2 – definitions

Mediation includes any process where “parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute”, regardless of whether it is chosen by the parties, or suggested or ordered by a court. It does not include attempts by a judge to settle a dispute within the course of judicial proceedings.

Article 3 – referral

Courts can invite the parties to attend mediation, or require them to attend an information session on mediation. The intention is to encourage parties to consider using mediation, but not to make it compulsory. However, individual member states are not prevented from introducing legislation to make mediation compulsory, providing that “such legislation does not impede on the right of access to the judicial system”.

Article 4 – quality

Voluntary codes of conduct for mediators should be promoted by the Commission and member states, but there is no process for monitoring or enforcing this. The emphasis is on self-regulation.

Article 5 – enforcement

The directive proposes that a settlement agreement reached through mediation can be confirmed in a court judgement “upon request of the parties”. This can then be enforced in the same way as a judgement. The Commission thinks this would have particular relevance in cross-border disputes. The DCA would particularly like comments on whether this is appropriate.

Article 6 – confidentiality

The process of mediation is intended to be privileged, including the invitation, proposals for settlement, admissions made during mediation, proposals made by the mediator, etc. Courts cannot order the disclosure of this information except:

- For enforcement of an agreement
- In the case of public policy – in particular the protection of children or to prevent harm to a person
- If the mediator and parties agree

Article 7 – limitation periods

The directive proposes that any time limitation period should be suspended when:

- the parties agree to use mediation
- mediation is ordered by a court
- an obligation to use mediation arises under national law

Time starts running again when mediation ends without a settlement agreement, “counting from the date when one or both parties declares that mediation is terminated, or effectively withdraws from it”. The DCA would particularly like comments on whether this is appropriate.

Article 8 – 10

details of implementation dates.

4 About ASA

ASA is the umbrella organisation for independent advice networks in the U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:

- AdviceUK
- Age Concern England
- Citizens Advice
- Citizens Advice Scotland
- DIAL UK (the disability information and advice service)
- Law Centres Federation
- Scottish Association of Law Centres
- Shelter
- Shelter Cymru
- Youth Access

Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law').

5 Introductory Comments

- 5.1 ASA has been asked by the DCA to comment on these proposals, particularly on articles 5 and 7. These comments have been drafted by the ASA policy team, and comments have been invited from our members. However, this response may not necessarily reflect the views of all our members.
- 5.2 We appreciate that the proposed directive was drafted to clarify the interaction between mediation and civil proceedings in civil and commercial disputes, and in particular in cross-border disputes. However, we have concerns that the implications of this directive might affect a much wider range of civil justice issues than was initially intended, and we believe that the European Commission and individual Member States need to give careful thought to potential repercussions. We strongly suggest that the DCA should consult its legal department before responding to the Commission.
- 5.3 We have commented on articles 3, 4, 5, 6 and 7.

6 Article 3

- 6.1 In 1.1.4 the EU directive states that mediation is “one of several dispute resolution methodswhich may be the most suited for some, but certainly not all, disputes”. In the light of this, ASA does not believe that it is appropriate for individual Member States to be able to make mediation itself compulsory. In the UK, the Halsey

Judgement (May 2004) established that while all members of the legal profession and their clients should routinely consider the use of ADR, making ADR compulsory would be contrary to Article 6 of the European Convention on Human Rights.

6.2 ASA's view is that ADR can be a useful alternative to court proceedings, but that individuals should be able to make an informed decision about which dispute resolution process to use, based on informed, independent legal advice.

6.3 If individual Member States introduce national legislation to encourage mediation through "incentives or sanctions" there are two important caveats:

- incentives should not be disproportionately attractive to individuals who are poor or socially excluded, such as the refusal of legal aid for representation to people who have not first tried ADR. This could give rise to the impression of a separate justice system for rich and poor
- sanctions should apply only when refusal is unreasonable, and it is important that there is clarity about what constitutes an "unreasonable" refusal. Parties must be aware in advance of the criteria by which sanctions may be applied

7 Article 4

7.1 This article proposes voluntary codes of conduct for mediators, but makes no provision either for regulation of mediators, or for any form of consistent European quality assurance system. Mediation constitutes a form of privatised justice, which is confidential, and not open to scrutiny by the state or by the public. It is therefore particularly important that there should be regulation. ASA's view is that there should be a requirement on Member States to be responsible for some form of regulation of mediation.

7.2 Currently in the UK the LSC has developed a mediation quality mark which applies to family and community mediation only. There is no formal regulation of mediation other than self-regulation by mediation providers. Market competition may offer an element of informed choice in some high value private business disputes, but most potential users of mediation services are not repeat players, and therefore not in a position to make an informed choice of providers. Regulation is particularly important in areas such as special educational needs mediation, disability conciliation, mediation in employment disputes, and mediation in consumer disputes, where there may be considerable disparity between the parties. This is also a significant issue where mediation providers are offering services through county courts which are therefore either implicitly or explicitly endorsed by the Court Service and the DCA.

8 Article 5

8.1 ASA has concerns about the proposal that mediated agreements could become enforceable through the courts. There are a number of serious issues which arise as a result of translating a mediated agreement into an enforceable court order. One of the advantages of mediation is that it is essentially a private process of negotiation with a wide range of potential outcomes, many of which would not normally form part of a court judgement. Such agreements would be difficult to frame as court orders unless the mediation had taken place as part of the litigation process. In such cases, the issues being mediated would already have been framed in justiciable terms, and the mediated agreement could be presented as a consent order.

8.2 If for commercial reasons it is important that mediated agreements can be confirmed in a court judgement, the two main options would be:

- 1 For a party to take the case to court requesting enforcement of the mediation agreement as a contract, or
- 2 For there to be some form of judicial oversight before turning the mediated agreement into a court order. This is particularly important where there is no regulation of mediators (see comments on article 4). The judge would need to consider a number of criteria, including:
 - Whether it is practicable for the terms of the mediated agreement to be enforced by a court
 - Whether there is an imbalance of power between the parties which might have affected the outcome of the mediation
 - Whether both parties have had access to independent advice during the course of mediation, and before signing the agreement
 - Whether the agreement is potentially contrary to public policy

8.3 It would also be important for Member States to clarify whether court judgements arising from mediated agreements would form any kind of legal precedent. This could be a significant issue in a common law jurisdiction such as the UK.

9 Article 6

9.1 There are three issues relating to confidentiality which need to be given consideration:

9.2 Lack of publicity of outcomes in all cases, and public law cases in particular, creates an impression of lack of transparency and accountability in the mediation process, which could be contrary to public policy.

9.3 The guide to the professional conduct of solicitors in the UK outlines a number of circumstances in which the duty of confidentiality should be overridden (section 16.02). In addition to the criteria proposed for mediators in article 6, these include:

- Where the solicitor is being used to facilitate a crime or fraud
- In order to prevent a criminal act that is likely to result in serious bodily harm
- In order to prevent terrorism
- Where a solicitor has reason to believe that any money involved may be the proceeds of crime

If the exceptions to the duty of confidentiality are to be different for mediators than for solicitors, any distinctions would need to be clarified and justified.

9.4 Information about the invitation to mediate and the response of the other party is currently admissible in UK courts. This is because cost penalties for “unreasonable” refusal to mediate can be imposed by the court. Member States where this form of incentive to mediate is allowed or encouraged need to clarify what information is and is not admissible in court.

10 Article 7

- 10.1 It is important that there is clarity for both parties about whether and when time has stopped running, or started running again, in time-limited proceedings. Without such clarity, there is a risk of further satellite litigation around the confusion that may result. We therefore think that it is inappropriate that time should start running again from the date when one party “effectively withdraws from” mediation, as this runs the risk of lack of clarity. There should be some written procedure for withdrawing from mediation that makes it clear to both parties whether the mediation process is continuing, or whether it has ended, and that any time limitation is no longer suspended.
- 10.2 We are particularly concerned that suspending time limits in public law cases to enable mediation will lead to unacceptable delay. It is important that there is certainty about the lawfulness of decisions made by public authorities.