Basic information

2004/0251(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure completed
Certain aspects of mediation in civil and commercial matters See also 2011/2026(INI) See also 2016/2066(INI) **Subject** 7.40.02 Judicial cooperation in civil and commercial matters	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
JURI Legal Affairs	MCCARTHY Arlene (PSE)	10/03/2008

Former committee responsible	Former rapporteur	Appointed
JURI Legal Affairs	MCCARTHY Arlene (PSE)	24/11/2004

Former committee for opinion	Former rapporteur for opinion	Appointed
LIBE Civil Liberties, Justice and Home Affairs	BLOKLAND Johannes (IND/DEM)	21/02/2005

Council of the European Union

Council configuration	Meetings	Date
Justice and Home Affairs (JHA)	2827	2007-11-08
Justice and Home Affairs (JHA)	2696	2005-12-01
Justice and Home Affairs (JHA)	2853	2008-02-28

European Commission

Commission DG	Commissioner
Justice and Consumers	FRATTINI Franco

Key events

Date	Event	Reference	Summary

22/10/2004	Legislative proposal published	COM(2004)0718	Summary
27/10/2004	Committee referral announced in Parliament, 1st reading		
01/12/2005	Debate in Council		Summary
20/03/2007	Vote in committee, 1st reading		
22/03/2007	Committee report tabled for plenary, 1st reading	A6-0074/2007	
29/03/2007	Decision by Parliament, 1st reading	T6-0088/2007	Summary
29/03/2007	Results of vote in Parliament		
28/02/2008	Council position published	15003/5/2007	Summary
13/03/2008	Committee referral announced in Parliament, 2nd reading		
08/04/2008	Vote in committee, 2nd reading		Summary
14/04/2008	Committee recommendation tabled for plenary, 2nd reading	A6-0150/2008	
23/04/2008	Decision by Parliament, 2nd reading	T6-0166/2008	Summary
23/04/2008	Results of vote in Parliament		
21/05/2008	Final act signed		
21/05/2008	End of procedure in Parliament		
24/05/2008	Final act published in Official Journal		

Technical information

Procedure reference	2004/0251(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Amendments and repeals	See also 2011/2026(INI) See also 2016/2066(INI)
Legal basis	EC Treaty (after Amsterdam) EC 061- EC Treaty (after Amsterdam) EC 067-p5
Stage reached in procedure	Procedure completed
Committee dossier	JURI/6/60436

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee opinion	LIBE	PE357.668	23/06/2005	
Committee draft report		PE374.428	21/09/2006	
Amendments tabled in committee		PE380.658	25/10/2006	
Amendments tabled in committee		PE382.539	16/01/2007	

Committee report tabled for plenary, 1st reading/single reading		A6-0074/2007	22/03/2007	
Text adopted by Parliament, 1st reading/single reading		T6-0088/2007	29/03/2007	Summary
Committee draft report		PE404.420	12/03/2008	
Committee recommendation tabled for plenary, 2nd reading		A6-0150/2008	14/04/2008	
Text adopted by Parliament, 2nd reading		T6-0166/2008	23/04/2008	Summary

Council of the EU

Document type	Reference	Date	Summary
Council statement on its position	05705/2008	11/02/2008	
Council position	15003/5/2007	28/02/2008	Summary
Draft final act	03624/2008/LEX	21/05/2008	

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2004)0718	22/10/2004	Summary
Document attached to the procedure	SEC(2004)1314	22/10/2004	
Commission communication on Council's position	COM(2008)0131	07/03/2008	Summary
Follow-up document	COM(2016)0542	26/08/2016	Summary

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
EESC	Economic and Social Committee: opinion, report	CES0688/2005 OJ C 286 17.11.2005, p. 0001-0003	09/06/2005	

Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	

Final act

Directive 2008/0052
OJ L 136 24.05.2008, p. 0003 Summary

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 29/03/2007 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted the resolution drafted by Arlene **McCarthy** (PES, UK) and made some amendments which sought to clarify and improve on the original proposal. The main amendments are as follows:

- the definitions of mediator and mediation are modified. "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 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. "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;

- there is a new clause on the European Code of Conduct for Mediators, in order to see that quality standards are ensured. Member States must encourage the development of a system of certification of national bodies offering training courses in mediation;

- the provisions on recognition and enforcement are amended to make sure that they are legally watertight and respect the legal traditions of the various Member States;

- regarding scope, the amendments make it clear that the directive will 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). The Directive will 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. Notwithstanding this provision, Articles 6 and 7 (relating to confidentiality) 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;

- the provisions on confidentiality are modified, with Parliament proposing what it feels is a workable way of dealing with this question which affords Member States the latitude to adopt stricter rules if they consider this to be desirable. Given that mediation is intended to take place in a manner which respects confidentiality, Member States must 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 in certain prescribed cases;

- provisions regarding limitation periods are amended;

- Member States must ensure that information is available to citizens, in particular on Internet sites, on how to contact mediation providers and mediators.

- Parliament feels that the Directive should apply to domestic cases as well as cross-border ones.

A new recital states that Member States are encouraged to apply the provisions of this Directive also to internal cases with a view y to facilitating the proper functioning of the internal market. Moreover, the fact that the provisions of the 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 the Directive.

- a new recital states that the 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 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. Parliament inserted this recital in view of the fact that the principles of transparency, impartiality, effectiveness and fairness included in Recommendation 2001/310 (consensual resolution of consumer disputes) should be incorporated in the proposed directive.

Lastly, the transposition clause has been amended. It now states that 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, (review clause) for which the date of compliance shall be 1 September 2009.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 23/04/2008 - Text adopted by Parliament, 2nd reading

The European Parliament adopted a legislative resolution approving the Council common position for adopting a directive of the European Parliament and of the Council on **certain aspects of mediation in civil and commercial matters.** The report was tabled for consideration in plenary by Arlene **McCARTHY** (PES, UK) on behalf of the Committee on Legal Affairs.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 07/03/2008 - Commission communication on Council's position

To recall, the Council's common position is the result of negotiations between the three institutions. Although the Commission had wanted the proposed Directive to cover both cross-border and internal disputes, a majority in Parliament and Council opposed this provision. In view of these circumstances and in a spirit of compromise the Commission accepts the Directive's scope, as presented in the common position – provided that the definition of cross-border cases is as broad as possible.

The Commission is of the view that the common position enlarges the definition of cross-border cases with regard to the two most important Articles of the Directive that concern confidentiality and limitation and prescription periods. Concerning the provisions on limitation and prescription period (Article 8), the common position does not harmonise national rules on limitation and prescription periods. It does, however, oblige the Member States to ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitrate if their mediation attempts fail. A revised recital clarifies that this result has to be achieved regardless of differences in national legislation. In this respect the Council's common position is in line with the objectives set out in the Commission's initial position.

The common position varies from the position of the European Parliament, as set out in first reading, in the following way:

- It does not allow the Directive to be implemented by means of voluntary agreements between the parties. The Commission fully agrees with this, given that the Directive affects rules on judicial proceedings in the Member States, which cannot always be modified by agreements between the parties.
- It does not allow for the publication of the "European Code of Conduct for Mediators" in the Official Journal, given that the Code is not an official legislative act. It does, however, allow for the Code to be published on the internet. The Commission is also committed to including a reference to the Code of Conduct in the EU-Bulletin. The Commission accepts this stance.
- It requires the Commission's review report to consider the development of mediation throughout the European Union – a position which the Commission also accepts.

Overall, therefore, the Commission accepts the common position which, although modifying some features of the initial proposal, remains faithful to its core objective, namely to facilitate access to dispute resolution and promoting the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 21/05/2008 - Final act

PURPOSE: to promote the further use of mediation in civil and commercial matters.

LEGISLATIVE ACT: Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters

CONTENT: the objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. The Directive will apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. 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).

A cross-border dispute is one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: the parties agree to use mediation after the dispute has arisen; mediation is ordered by a court; an obligation to use mediation arises under national law; or an invitation is made to the parties.

A court before which an action is brought may 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. This is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions.

Enforceability of agreements resulting from mediation: Member States must ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement must be made enforceable unless either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made. Member States must inform the Commission of the courts or other authorities competent to receive requests.

Confidentiality of mediation: given that mediation is intended to take place in a manner which respects confidentiality, Member States must ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process will be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except under certain specified circumstances.

Parties who choose mediation in an attempt to settle a dispute must not subsequently be prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

Review: not later than 21 May 2016.

ENTRY INTO FORCE: 25/05/2008.

TRANSPOSITION: 21/05/2011, with the exception of Article 10 (Information on competent courts and authorities), for which the date of compliance shall be 21/11/ November/2010 at the latest.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 01/12/2005

The Council reached common understanding on the text of a draft Directive on mediation in civil and commercial matters, subject to the definition of cross-border crisis and the application of the principle of subsidiarity.

To recall, the Commission submitted this proposal on 22 October 2004 and it is subject to the codecision procedure. The European Parliament has not yet delivered its opinion at first reading.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 22/10/2004 - Legislative proposal

PURPOSE : to promote the further use of mediation in civil and commercial matters.

PROPOSED ACT : Directive of the European Parliament and of the Council.

CONTENT : 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.

Bearing this mind, the Commission presents this proposal. It provides that a court before which an action is brought may 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. This is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions. Furthermore:

- the Commission and the Member States must 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.

- Member States will 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.

- Member States must ensure that, upon request of the parties, a settlement agreement reached as a result of a mediation can be confirmed in a judgment 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;

- Mediators, as well people involved in the administration of mediation services, may not in civil judicial proceedings give testimony or evidence regarding certain matters; These include: an invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation; views expressed by a party in a mediation in respect of a possible settlement of the dispute; statements or admissions made by a party in the course of the mediation; and the fact that a party had indicated its willingness to accept a proposal for a settlement made by the mediator.

There are, however, some prescribed exceptions to this provision. Finally, there are provisions relating to the suspension of limitation periods.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 08/11/2007

The Council reached a political agreement on a draft Directive on mediation in civil and commercial matters.

The main points of this agreement can be summarised as follows:

- the objective of this proposal is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings;

- a cross-border dispute is one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which: a) the parties agree to use mediation after the dispute has arisen, or b) mediation is ordered by a court, or c) an obligation to use mediation arises under national law, or d) an invitation is made to the parties;

- this Directive will apply to processes where two or more parties to a cross-border dispute attempt themselves on a voluntary basis to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it

should not apply to rights and obligations which the parties are not free to decide on themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and labour law;

- Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable;

- it should only be possible for a Member State to refuse to render an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. The content of an agreement resulting from mediation which has been rendered enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community law or national law;

- Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails.

The new compromise text reflects the amendments agreed with the European Parliament.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 28/02/2008 - Council position

The Council’s common position, for the most part, corresponds to the text of the political agreement formed in November 2007 – the result of negotiations between the Council, the Commission and the European Parliament.

Recitals:

The Council accepted, in substance most of the amendments relating to the recitals, albeit that many have been redrafted and inserted in a different order. The Council has inserted some new recitals that seek to explain certain aspects of the draft Directive. For example, the Council acknowledges that modern communication technologies are bound to be increasingly used in the mediation process. The Council has also made clear that the draft Directive does not lay down enforcement rules and the current Member State enforcement rules remain unaffected by the Directive. Additionally, in order to abide by the Interinstitutional agreement on better lawmaking, the Council has inserted a new recital that encourages the Member States to draw up correlation tables when implementing the Directive.

Articles:

Amendments, which to a large extent mirror the text of the common understanding (dating back to the December 2005) have largely been accepted.

In regard to other measures, the Council’s common position:

- has accepted a new Article on the cross-border nature of the Directive, but has redrafted the provision to some extent;
- has agreed to specifically mention that the mediation process is of a voluntary nature (and as a result has decided not to insert a new paragraph as originally proposed by Parliament);
- has decided to maintain the text of the common understanding regarding mediator requirements;
- has decided not to accept an amendment which would have made is impossible for mediation parties to disclose information concerning the mediation process and that the ban on disclosure should also cover disclosure to third parties. By maintaining the text of the common understanding, the Council has decided not to oblige Member States to ensure that those involved in a mediation process will not have the right to give evidence;
- has decided not to publish the “European Code of Conduct for Mediators” in the Official journal given that the Code is not an officially adopted text. It is, however, referred to in Recital 17 of the common position;
- has decided to accept a review clause, albeit with different wording. The Council was, however, unable to accept the suggestion concerning harmonised limitation and prescription periods;
- has decided not accept an amendment concerning the implementation of voluntary agreements. This has been rejected on the grounds that it would be impossible for legal reasons. On the other hand, and in order to make it clear that existing self-regulating mediations systems can be maintained, in so far as they deal with all aspects not covered by the Directive, a sentence to this effect has been inserted in one of the recitals;
- has decided to propose different dates for the Directive’s compliance. The Member States will now have 36 months from the date of adoption to comply with the Directive.

To conclude, the Council considers its common position to be a well-balanced text that faithfully reflects the agreement reached with Parliament in October 2007.

Certain aspects of mediation in civil and commercial matters

2004/0251(COD) - 26/08/2016 - Follow-up document

The Commission presented a report on the application of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

The Directive seeks to facilitate access to alternative dispute resolution (ADR) and to promote the amicable settlement of disputes, by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings. It applies in cross-border disputes to civil and commercial matters and had to be transposed into national law by 21 May 2011.

General assessment: based on a study carried out in 2013 and updated in 2016, a public online consultation and a discussion with Member States in the European Judicial Network in civil and commercial matters, the evaluation shows that overall, **the Directive has provided EU added value**.

It appears that the implementation of the Mediation Directive has had a **significant impact on the legislation** of many Member States. It has provided EU added value by raising awareness amongst national legislators on the advantages of mediation. Respondents in the public consultation recognised the important role of mediation in particular in family law matters (especially in proceedings concerning the custody over children, access rights and child abduction cases), besides the commercial disputes.

The report focused on the following points:

- **almost all Member States have extended the scope of their measures transposing** the Directive beyond cross-border to domestic cases;
- the adoption of **codes of conduct** at national level is perceived by stakeholders as an important tool to ensure the quality of mediation. The European Code of Conduct for Mediators plays a key role in this context, either because it is directly used by stakeholders or has inspired national or sectorial codes;
- 18 Member States have rules relating to **quality control mechanisms concerning the provision of mediation services**. Most Member States have obligatory accreditation procedures for mediators and run registries for mediators;
- 17 Member States **encourage training or regulate** it in part or in detail in their national legislation. Most Member States regulate the initial training of mediators and make it mandatory;;
- all Member States foresee the possibility for courts to **invite the parties to use mediation** or at least to attend information sessions on mediation. However, a significant majority of stakeholders considered practices aimed at motivating parties to use mediation as not effective;
- all Member States provide for the **enforceability of mediation** agreements as prescribed by the Directive;
- **confidentiality** of mediation is protected in all Member States as required by the Directive;
- all national laws ensure that that parties who choose mediation are **not subsequently prevented from initiating judicial proceedings** by the expiry of limitation or prescription periods during the mediation process;
- 13 Member States have included the obligation to **spread information about mediation** in their national legislation.

Possible improvements: the report noted certain **difficulties** concerning the functioning of the national mediation systems in practice. These difficulties are mainly related to the lack of a mediation "culture" in Member States, insufficient knowledge of how to deal with cross-border cases, the low level of awareness of mediation and the functioning of the quality control mechanisms for mediators. A number of respondents in the public consultation argued that mediation was not yet sufficiently known and that a "cultural change" is still necessary to ensure that citizens trust mediation. They also stressed that judges and courts remain reluctant to refer parties to mediation.

The evaluation shows that there is **no need at this time to revise the Directive** but that its application can be further improved:

1. The report recommended that **Member States should increase their efforts to promote and encourage the use of mediation** through the various means and mechanisms foreseen in the Directive and addressed in this report. In particular, further efforts at national level should be made to increase the number of cases in which courts invite the parties to use mediation in order to settle their dispute. The following can be considered as **examples of best practice** in this regard:

- requirements for parties to state in their applications to courts whether mediation has been attempted,
- in particular in family law matters obligatory information sessions within the framework of a judicial procedure and an obligation on courts to consider mediation at every stage of judicial proceedings, financial incentives making it economically more attractive for parties to use mediation instead of resorting to judicial proceedings,
- ensuring enforceability without necessarily requiring the consent of all parties to the agreement.

2. The Commission will continue to **co-finance mediation-related projects** through its "Justice Programme".

Furthermore, it will continue to consult the European Judicial Network in civil and commercial matters to further promote the take-up of mediation, e.g. in order to obtain a more solid data basis on the use of mediation and to increase awareness of the public, in particular of the information available on the website of the European e-justice Portal on the mediation systems of Member States.