

**EUROPEAN COMMISSION FOR THE EFFICIENCY OF
JUSTICE
(CEPEJ)**

**BETTER IMPLEMENTATION OF MEDIATION IN
THE MEMBER STATES OF THE COUNCIL OF
EUROPE**

Concrete rules and provisions

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As regards mediation, the Committee of Ministers of the Council of Europe has adopted, for the attention of member States, the four aforementioned Recommendations. Further on, the European commission for the efficiency of justice (CEPEJ) decided to draft guidelines to ensure that the Recommendations should be more widely publicised and disseminated in the States on one hand and, on the other hand, that the States should apply more efficiently the principles set out in them. These guidelines are also included in this document.

MEDIATION IN FAMILY AND CIVIL MATTERS

Recommendation No. R (98)1 on family mediation

(Adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies)

1. The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,
2. Recognising the growing number of family disputes, particularly those resulting from separation or divorce, and noting the detrimental consequences of conflict for families and the high social and economic cost to States;
3. Considering the need to ensure the protection of the best interests and welfare of the child as enshrined in international instruments, especially taking into account problems concerning custody and access arising as a result of a separation or divorce;
4. Having regard to the development of ways of resolving disputes in a consensual manner and the recognition of the necessity to reduce conflict in the interest of all the members of the family;
5. Acknowledging the special characteristics of family disputes, namely:
 - the fact that family disputes involve persons who, by definition, will have interdependent and continued relationships;
 - the fact that family disputes arise in a context of distressing emotions and increase them;
 - the fact that separation and divorce impact on all the members of the family, especially children;
6. Referring to the European Convention on the Exercise of Children's Rights, and in particular to Article 13 of this convention, which deals with the provision of mediation or other processes to resolve disputes affecting children;
7. Taking into account the results of research into the use of mediation and experiences in this area in several countries, which show that the use of family mediation has the potential to:
 - improve communication between members of the family;
 - reduce conflict between parties in dispute;
 - produce amicable settlements;
 - provide continuity of personal contacts between parents and children;
 - lower the social and economic costs of separation and divorce for the parties themselves and States;
 - reduce the length of time otherwise required to settle conflict;
8. Emphasising the increasing internationalisation of family relationships and the very particular problems associated with this phenomenon;

9. Realising that a number of States are considering the introduction of family mediation;

10. Convinced of the need to make greater use of family mediation, a process in which a third party, the mediator, impartial and neutral, assists the parties themselves to negotiate over the issues in dispute and reach their own joint agreements,

11. Recommends the governments of member States:

- i. to introduce or promote family mediation or, where necessary, strengthen existing family mediation;
- ii. to take or reinforce all measures they consider necessary with a view to the implementation of the following principles for the promotion and use of family mediation as an appropriate means of resolving family disputes.

PRINCIPLES OF FAMILY MEDIATION

I. Scope of mediation

a. Family mediation may be applied to all disputes between members of the same family, whether related by blood or marriage, and to those who are living or have lived in family relationships as defined by national law.

b. However, states are free to determine the specific issues or cases covered by family mediation.

II. Organisation of mediation

a. Mediation should not, in principle, be compulsory.

b. States are free to organise and deliver mediation as they see fit, whether through the public or private sector.

c. Irrespective of how mediation is organised and delivered, States should see to it that there are appropriate mechanisms to ensure the existence of:

- procedures for the selection, training and qualification of mediators;
- standards to be achieved and maintained by mediators.

III. Process of mediation

States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles:

- i. the mediator is impartial between the parties;
- ii. the mediator is neutral as to the outcome of the mediation process;

- iii. the mediator respects the point of view of the parties and preserves the equality of their bargaining positions;
- iv. the mediator has no power to impose a solution on the parties;
- v. the conditions in which family mediation takes place should guarantee privacy;
- vi. discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties or in those cases allowed by national law;
- vii. the mediator should, in appropriate cases, inform the parties of the possibility for them to use marriage counselling or other forms of counselling as a means of resolving their marital or family problems;
- viii. the mediator should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children;
- ix. the mediator should pay particular regard to whether violence has occurred in the past or may occur in the future between the parties and the effect this may have on the parties' bargaining positions, and should consider whether in these circumstances the mediation process is appropriate;
- x. the mediator may give legal information but should not give legal advice. He or she should, in appropriate cases, inform the parties of the possibility for them to consult a lawyer or any other relevant professional person.

IV. The status of mediated agreements

States should facilitate the approval of mediated agreements by a judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law.

V. Relationship between mediation and proceedings before the judicial or other competent authority

a. States should recognise the autonomy of mediation and the possibility that mediation may take place before, during or after legal proceedings.

b. States should set up mechanisms which would:

- i. enable legal proceedings to be interrupted for mediation to take place;

ii. ensure that in such a case the judicial or other competent authority retains the power to make urgent decisions in order to protect the parties or their children, or their property;

iii. inform the judicial or other competent authority whether or not the parties are continuing with mediation and whether the parties have reached an agreement.

VI. Promotion of and access to mediation

a. States should promote the development of family mediation, in particular through information programmes given to the public to enable better understanding about this way of resolving disputes in a consensual manner.

b. States are free to establish methods in individual cases to provide relevant information on mediation as an alternative process to resolve family disputes (for example, by making it compulsory for parties to meet with a mediator), and by this enable the parties to consider whether it is possible and appropriate to mediate the matters in dispute.

c. States should also endeavour to take the necessary measures to allow access to family mediation, including international mediation, in order to contribute to the development of this way of resolving family disputes in a consensual manner.

VII. Other means of resolving disputes

States may examine the desirability of applying, in an appropriate manner, the principles for mediation contained in this recommendation, to other means of resolving disputes.

VIII. International matters

a. States should consider setting up mechanisms for the use of mediation in cases with an international element when appropriate, especially in all matters relating to children, and particularly those concerning custody and access when the parents are living or expect to live in different States.

b. International mediation should be considered as an appropriate process in order to enable parents to organise or reorganise custody and access, or to resolve disputes arising following decisions having been made in relation to those matters. However, in the event of an improper removal or retention of the child, international mediation should not be used if it would delay the prompt return of the child.

c. All the principles outlined above are applicable to international mediation.

d. States should, as far as possible, promote co-operation between existing services dealing with family mediation with a view to facilitating the use of international mediation.

e. Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training.

Recommendation Rec (2002)10 on mediation in civil matters

(Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Welcoming the development of means of resolving disputes alternative to judicial decisions and agreeing on the desirability of rules providing guarantees when using such means;

Underlining the need to make continuous efforts to improve the methods of resolving disputes, while taking into account the special features of each jurisdiction;

Convinced of the advantages of providing specific rules for mediation, a process where a "mediator" assists the parties to negotiate over the issues in dispute and reach their own joint agreement;

Recognising the advantages of mediation in civil matters in appropriate cases;

Conscious of the necessity to organise mediation in other branches of the law;

Having in mind Recommendation No. R(98)1 on family mediation, Recommendation No. R(99)19 on mediation in penal matters and Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, as well as the results of other activities and research carried out by the Council of Europe and at a national level;

Having regard more particularly to Resolution No. 1 on "Delivering justice in the 21st century" adopted by the European Ministers of Justice at their 23rd Conference in London on 8-9 June 2000 and in particular to the invitation addressed by the European Ministers of Justice to the Committee of Ministers of the Council of Europe to draw up, in co-operation in particular with the European Union, a programme of work aimed at encouraging the use, where appropriate, of extra-judicial dispute resolution procedures;

Aware of the important role of courts in promoting mediation;

Noting that, although mediation may help to reduce conflicts and the workload of courts, it cannot be a substitute for an efficient, fair and easily accessible judicial system;

- A. Recommends the governments of member states:
- i. to facilitate mediation in civil matters whenever appropriate;
 - ii. to take or reinforce, as the case may be, all measures which they consider necessary with a view to the progressive implementation

of the “Guiding Principles concerning mediation in civil matters” set out below.

Guiding Principles concerning mediation in civil matters

I. Definition of mediation

1. For the purposes of this Recommendation, “mediation” refers to a dispute resolution process whereby parties negotiate over the issues in dispute in order to reach an agreement with the assistance of one or more mediators.

II. Scope of application

2. This Recommendation applies to civil matters. For the purpose of this Recommendation, the term “civil matters” refers to matters involving civil rights and obligations including matters of a commercial, consumer and labour law nature, but excluding administrative or penal matters. This Recommendation is without prejudice to the provisions of Recommendation No. R(98)1 on family mediation.

III. Organisation of mediation

3. States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector.

4. Mediation may take place within or outside court procedures.

5. Even if parties make use of mediation, access to the court should be available as it constitutes the ultimate guarantee for the protection of the rights of the parties.

6. When organising mediation, States should strike a balance between the needs for and the effects of limitation periods and the promotion of speedy and easily accessible mediation procedures.

7. When organising mediation, States should pay attention to the need to avoid (i) unnecessary delay and (ii) the use of mediation as a delaying tactic.

8. Mediation may be particularly useful where judicial procedures alone are less appropriate for the parties, especially owing to the costs, the formal nature of judicial procedures, or where there is a need to maintain dialogue or contacts between the parties.

9. States should take into consideration the opportunity of setting up and providing wholly or partly free mediation or providing legal aid for mediation in particular if the interests of one of the parties require special protection.

10. Where mediation gives rise to costs, they should be reasonable and proportionate to the importance of the issue at stake and to the amount of work carried out by the mediator.

IV. Mediation process

11. States should consider the extent, if any, to which agreements to submit a dispute to mediation may restrict the parties' rights of action.

12. Mediators should act independently and impartially and should ensure that the principle of equality of arms be respected during the mediation process. The mediator has no power to impose a solution on the parties.

13. Information on the mediation process is confidential and may not be used subsequently, unless agreed by the parties or allowed by national law.

14. Mediation processes should ensure that the parties be given sufficient time to consider the issues at stake and any other possible settlement of the dispute.

V. Training and responsibility of mediators

15. States should consider taking measures to promote the adoption of appropriate standards for the selection, responsibilities, training and qualification of mediators, including mediators dealing with international issues.

VI. Agreements reached in mediation

16. In order to define the subject-matter, the scope and the conclusions of the agreement, a written document should usually be drawn up at the end of every mediation procedure, and the parties should be allowed a limited time for reflection, which is agreed by the parties, after the document has been drawn up and before signing it.

17. Mediators should inform the parties of the effect of agreements reached and of the steps which have to be taken if one or both parties wish to enforce their agreement. Such agreements should not run counter to public order.

VII. Information on mediation

18. States should provide the public and the persons with civil disputes with general information on mediation.

19. States should collect and distribute detailed information on mediation in civil matters including, *inter alia*, the costs and efficiency of mediation.

20. Steps should be taken to set up, in accordance with national law and practice, a network of regional and/or local centres where individuals can obtain impartial advice and information on mediation, including by telephone, correspondence or e-mail.

21. States should provide information on mediation in civil matters to professionals involved in the functioning of justice.

VIII. International aspects

22. States should encourage the setting up of mechanisms to promote the use of mediation to resolve issues with an international element.

23. States should promote co-operation between existing services dealing with mediation in civil matters with a view to facilitating the use of international mediation.

B. Instructs the Secretary General of the Council of Europe to transmit this Recommendation to the competent authorities of the European Union, with a view to:

- promoting co-operation between the Council of Europe and the European Union in any follow-up to this Recommendation and, in particular, to disseminate information on the laws and procedures in States on the matters mentioned in this Recommendation through an Internet web site;
- and encouraging the European Union, when preparing rules at the European Community level, to draw up provisions aiming at supplementing or strengthening the provisions of this Recommendation or facilitating the application of the principles embodied in it.

GUIDELINES FOR A BETTER IMPLEMENTATION OF THE EXISTING RECOMMENDATIONS CONCERNING FAMILY MEDIATION AND MEDIATION IN CIVIL MATTERS

Introduction

1. At the Third Summit of the Council of Europe (Warsaw, May 2005), the Heads of State and Government undertook to make “full use of the Council of Europe’s standard-setting potential” and “promote implementation and further development of the Organisation’s legal instruments and mechanisms of legal co-operation”. They also decided “to help member states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes”.

2. In the light of these decisions, the CEPEJ, one of whose aims in its Statute is “to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice”, has included among its priorities a new activity directed towards facilitating effective implementation of Council of Europe instruments and standards regarding alternative dispute settlement.

3. The Working Group on Mediation (CEPEJ-GT-MED)¹ was therefore set up to gauge the impact in member states of the relevant recommendations of the Committee of Ministers, namely:

- Recommendation Rec(98)1 on family mediation,
- Recommendation Rec(2002)10 on mediation in civil matters,
- Recommendation Rec(99)19 concerning mediation in penal matters,
- Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties,

and to recommend specific measures for facilitating their effective implementation, thus improving implementation of the mediation principles contained in these recommendations.

4. This document concerns Recommendations Rec(98)1 on family mediation and Rec(2002)10 on mediation in civil matters. The two other Recommendations, which concern mediation in penal matters and alternatives to litigation between administrative authorities and private parties, require a specific approach and are examined in separate documents.

5. At the first meeting of the Working Group (Strasbourg, 8-10 March 2006), a questionnaire was drawn up to determine member states’ awareness of the above Recommendations and the development of mediation in their countries in accordance with the principles contained therein. The questionnaires were sent to 16 representative States.

¹ The CEPEJ-GT-MED is composed as followed: Ms Nina BETETTO (Slovenia), Ms Ivana BORZOVÁ (Czech Republic), Mr Peter ESCHWEILER (Germany), Ms Maria da Conceição OLIVEIRA (Portugal), Mr Rimantas SIMAITIS – President - (Lithuania), Mr Jeremy TAGG (United Kingdom), Ms Anna WERGENS (Sweden).

6. 52 replies were received to the questionnaire from member states and from practitioners and a report was drawn up by Mr Julien LHUILLIER (France), scientific expert, summarising those responses.

7. As might be expected, there are considerable differences between member states in the way that civil and family mediation has advanced, particularly because of the following obstacles:

- lack of awareness of mediation;
- high relative costs of mediation for the parties and financial imbalances;
- disparities in training and qualifications of mediators;
- disparities in the scope and guarantees of confidentiality.

8. In the light of these obstacles, the Working Group has therefore drawn up the following non binding guidelines to help member states to implement the Recommendations on family mediation and mediation in civil matters.

9. The Working Group took note of the work of the UNCITRAL (United Nations Commission on International Law), the European Union and other institutions in the field of mediation when drafting these guidelines.

1. AVAILABILITY

10. To expand equal availability of mediation services, measures should be taken to promote and set up workable mediation schemes across as wide a geographical area as possible.

1.1. Support of mediation projects by member states

11. Member states should recognise and promote existing as well as new workable mediation schemes by financial and other forms of support. Where successful mediation programmes have been established, member states are encouraged to expand their availability by information, training and supervision.

1.2. Role of the judges

12. Judges have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite the parties to use mediation and/or refer the case to mediation. It is important therefore that, mediation services are available, either by the establishment of court annexed mediation schemes or by directing parties to lists of mediation providers.

1.3. Role of lawyers

13. The codes of conduct for lawyers should include an obligation or a recommendation to consider alternative means of dispute resolution including mediation before going to court in appropriate cases, and to give relevant information and advice to their clients.

14. Bar associations and lawyers associations should have lists of mediation providers and disseminate them to lawyers.

1.4. Quality of mediation schemes

15. It is important that member states continually monitor their mediation schemes and on-going pilot projects and arrange for their external and independent evaluation. Certain common criteria, including both qualitative and quantitative evaluation aspects, should be developed to enable the quality of mediation schemes to be compared.

1.5. Confidentiality

16. The principle of confidentiality is essential for the confidence of the parties in the mediation process and its result. Therefore, the scope of confidentiality should be defined at all stages of the mediation process and after its termination. Member states are free to decide, according to national legal tradition and practice, whether the scope of confidentiality should be defined by legislative measures or by agreement or both.

17. Where the scope of confidentiality is defined by agreement, it should make clear those facts that can be revealed to third parties when the mediation is over.

18. The duty of confidentiality should be binding for the mediator at all stages of the mediation process and after its termination. Whenever this duty is subject to exceptions (e.g. when the mediator is called to witness on the facts of a crime revealed during the mediation, or when the mediator's participation as a witness on a trial is required in the best interest of a child, or to prevent harm to the physical or psychological integrity of a person), these exceptions should be clearly defined by legislation, self-regulation or agreement.

19. Member States should provide for legal guarantees of confidentiality in mediation. The breach of the confidentiality duty by a mediator should be considered as a serious disciplinary fault and be sanctioned appropriately.

1.6 Mediators' qualifications

20. It is essential for judges when referring parties to mediation, for lawyers when advising clients, and for the general public confidence in the mediation process that the quality of mediation is assured.

21. Member States and/or mediation stakeholders should provide adequate training programmes for mediators and, taking into account the disparities in training programmes, set up common standards concerning the training.

22. As a minimum, the following items should be covered in mediation training:

- principles and aims of mediation,
- attitude and ethics of the mediator,
- phases of the mediation process,

- traditional settlement of a dispute and mediation,
- indication, structure and course of mediation,
- legal framework of mediation,
- skills and techniques of communication and negotiation,
- skills and techniques of mediation,
- adequate amount of role plays and other practical exercises,
- peculiarities of family mediation and interest of the child (family mediation training) and of various types of civil mediation (civil mediation training),
- assessment of knowledge and competence of the trainee.

23. This training should be followed by supervision, mentoring and continuing professional development.

24. Member states should recognise the importance of establishing common criteria to permit the accreditation of mediators and/or institutions which offer mediation services and/or who train mediators. Because of the increased mobility throughout Europe, measures could be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.

25. As certain member states encounter problems where the quality of training of mediators is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for mediators and for mediation trainers (for example, a European training centre). This could be facilitated by the Council of Europe in co-operation with the European Union.

1.7. Best interests of the child

26. Where family mediation is concerned, member states unanimously recognise the importance of the child's best interests. However, the criteria for recognizing the child's best interests vary according to national legislations.

27. It is therefore recommended that member states and other bodies involved in family mediation work together to establish common valuation criteria to serve the best interest of the child, including the possibility for children to take part in the mediation process. These criteria should include the relevance of the child's age or mental maturity, the role of parents and the nature of the dispute. This could be facilitated by the Council of Europe in co-operation with the European Union.

1.8. Codes of conduct

28. Member states should take measures to ensure the uniformity in the concepts, scope and guarantees of the main principles of mediation such as confidentiality and others within their countries, by legislative measures and/or by developing codes of conduct for mediators.

29. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation

stakeholders throughout Europe, it is recommended that member states promote this Code as a minimum standard for civil and family mediation, taking into account the specific nature of family mediation.

1.9. Breaches of codes of conducts

30. Where mediators breach a code of conduct, member states and mediation stakeholders should have in place appropriate complaints and disciplinary procedures.

1.10. International mediation

31. In response to Rec(98)1 on family mediation in particular, very few member states appear to have set up mechanisms for the use of mediation in cases with an international element. It is therefore recommended that those States that have made progress in this area facilitate an exchange of information with those that have not.

32. Bearing in mind the high cost of international mediation, States should encourage the use of new technologies instead of face-to-face meetings such as video and telephone conferencing as well as on-line dispute resolution methods.

2. ACCESSIBILITY

2.1. Cost of the mediation for the users

33. The cost of mediation for the users should be reasonable and proportionate to the issue at stake. In order to make mediation accessible for the general public, states should ensure some direct financial support to mediation services.

34. For reason of equality before the law and access to law, it is unacceptable for some categories of the population to be excluded from a service on financial grounds. For those with limited financial means, member states should be encouraged to make legal aid available for parties involved in the mediation in the same way that it would provide for legal aid in litigation.

35. In order to make international mediation accessible and bearing in mind the high cost and the complexity of organising international mediation, member states should take measures to establish, support and promote international mediation.

2.2. Suspension of limitation terms

36. Parties should not be prevented from using mediation by the risk of expiry of limitation terms. In practice, replies from member states show that few States provide for suspension of limitation terms when referring cases to mediation. In order to rectify this problem, member states are strongly encouraged to implement provisions for the suspension of limitation terms.

3. AWARENESS

37. Even if mediation is available and accessible to all, not everyone is aware of mediation. Responses to the questionnaire show that lack of awareness among judiciary, legal professionals, users of justice system and the general public is one of the main obstacles to the advancement of mediation. Member states and mediation stakeholders should keep in mind that it is hard to break society's reliance on the traditional court process, as the principal way of resolving disputes.

38. In order for the Recommendations on mediation in family and civil matters to be accessible to policy makers, academics, mediation stakeholders and mediators, it is vital that it is translated and disseminated in the languages of all member states.

39. It is recommended that CEPEJ creates a special page on mediation in its website. It could include translated text of the Recommendation, its explanatory memorandum and other relevant texts of the Council of Europe concerning mediation, assessment of the impact in countries of the Recommendations on mediation in civil and family matters. This special page could also include information on the monitoring and evaluation of mediation schemes and mediation pilot projects, list of mediation providers in member states, useful website links, etc.

3.1. Awareness of general public

40. Member states and mediation stakeholders should take appropriate measures to raise awareness of the benefits of the mediation among the general public.

41. Such measures may include:

- Articles/information in the media,
- dissemination of information on mediation via leaflets/booklets, internet, posters,
- mediation telephone helpline,
- information and advice centres,
- focused awareness programmes such as "mediation weeks",
- seminars and conferences,
- open days on mediation at courts and institutions which provide mediation services.

42. Member states and mediation stakeholders are also encouraged to make information available to the general public on how to contact mediators and organisations providing mediation services, in particular on the internet.

43. Member states should also note that court annexed mediation in practice appears to be an efficient means of raising awareness of mediation for the judiciary, legal professionals and users.

44. Member states, universities, other academic institutions and mediation stakeholders should support and promote scientific research in the field of mediation and alternative dispute resolution.

45. Mediation and other forms of dispute resolution should be included in schools national curricula.

3.2. Awareness of the users

46. Members of the judiciary, prosecutors, lawyers and other legal professionals as well as other bodies involved in dispute resolution should provide early information and advice on mediation specific to the parties in their dispute.

47. In order to make mediation more attractive to users, member states may wish to consider diminishing, abolishing or reimbursing court fees in specific cases if mediation is used to try to settle the dispute either before going to court or during court proceedings.

48. Member states may request from the users and from the providers of legal aid, before receiving legal aid for the litigation, to consider amicable settlement of the dispute, including mediation.

49. Parties could be sanctioned if they fail to actively consider the use of amicable dispute resolution. For example, member states may consider establishing a rule that parties normally entitled for reimbursement of their litigation costs in the civil or family dispute resolved by court judgment or decision do not receive full reimbursement if they have refused to go to mediation or if they failed to present the evidence that they have actively considered the use of amicable dispute resolution.

3.3. Awareness of the judiciary

50. Judges play a crucial role in fostering a culture of amicable dispute resolution. It is essential therefore that they have a full knowledge and understanding of the process and benefits of mediation. This may be achieved through information sessions as well as initial and in-service training programmes which include specific elements of mediation useful in day-to-day work of courts in particular jurisdictions.

51. It is important to foster both institutional and individual links between mediators and judges. This can be done in particular by conferences and seminars.

3.4. Awareness of the lawyers

52. Mediation should be included in the curricula of initial as well as continuous training programmes for lawyers.

53. Bar associations and lawyers associations should have lists of mediation programmes providers and disseminate them to lawyers.

54. Members States and Bar associations should take measures to create legal fee structures that do not discourage lawyers from advising clients to use mediation in settling disputes.

3.5. Awareness of non-governmental organisations and other concerned bodies

55. Member states and mediation stakeholders are encouraged to take measures to raise the awareness of non-governmental organisations and other concerned bodies to mediation.

MEDIATION IN PENAL MATTERS

Recommendation No. R (99) 19 concerning mediation in penal matters

(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Noting the developments in member States in the use of mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings;

Considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community;

Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation;

Considering the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes;

Recognising that mediation requires specific skills and calls for codes of practice and accredited training;

Considering the potentially substantial contribution to be made by non-governmental organisations and local communities in the field of mediation in penal matters and the need to combine and to co-ordinate the efforts of public and private initiatives;

Having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Bearing in mind the European Convention on the Exercise of Children's Rights as well as Recommendations No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, No. R (87) 18 concerning the simplification of criminal justice, No. R (87) 21 on assistance to victims and the prevention of victimisation, No. R (87) 20 on social reactions to juvenile delinquency, No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families, No. R (92) 16 on the European Rules on community sanctions and measures, No. R (95) 12 on the management of criminal justice and No. R (98) 1 on family mediation;

Recommends that the governments of member States consider the principles set out in the appendix to this Recommendation when developing mediation in penal matters, and give the widest possible circulation to this text.

Appendix to Recommendation No. R (99) 19

I. Definition

These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

II. General principles

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.
2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.
3. Mediation in penal matters should be a generally available service.
4. Mediation in penal matters should be available at all stages of the criminal justice process.
5. Mediation services should be given sufficient autonomy within the criminal justice system.

III. Legal basis

6. Legislation should facilitate mediation in penal matters.
7. There should be guidelines defining the use of mediation in penal matters. Such guidelines should in particular address the conditions for the referral of cases to the mediation service and the handling of cases following mediation.
8. Fundamental procedural safeguards should be applied to mediation; in particular, the parties should have the right to legal assistance and, where necessary, to translation/interpretation. Minors should, in addition, have the right to parental assistance.

IV. The operation of criminal justice in relation to mediation

9. A decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.

10. Before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision.

11. Neither the victim nor the offender should be induced by unfair means to accept mediation.

12. Special regulations and legal safeguards governing minors' participation in legal proceedings should also be applied to their participation in mediation in penal matters.

13. Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.

14. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.

15. Obvious disparities with respect to factors such as the parties' age, maturity or intellectual capacity should be taken into consideration before a case is referred to mediation.

16. A decision to refer a criminal case to mediation should be accompanied by a reasonable time-limit within which the competent criminal justice authorities should be informed of the state of the mediation procedure.

17. Discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*).

18. When a case is referred back to the criminal justice authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay.

V. The operation of mediation services

V.1. Standards

19. Mediation services should be governed by recognised standards.

20. Mediation services should have sufficient autonomy in performing their duties. Standards of competence and ethical rules, as well as procedures for the selection, training and assessment of mediators should be developed.

21. Mediation services should be monitored by a competent body.

V.2. Qualifications and training of mediators

22. Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities.

23. Mediators should be able to demonstrate sound judgment and interpersonal skills necessary to mediation.

24. Mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system.

V.3. Handling of individual cases

25. Before mediation starts, the mediator should be informed of all relevant facts of the case and be provided with the necessary documents by the competent criminal justice authorities.

26. Mediation should be performed in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. The mediator should always respect the dignity of the parties and ensure that the parties act with respect towards each other.

27. The mediator should be responsible for providing a safe and comfortable environment for the mediation. The mediator should be sensitive to the vulnerability of the parties.

28. Mediation should be carried out efficiently, but at a pace that is manageable for the parties.

29. Mediation should be performed *in camera*.

30. Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned.

V.4. Outcome of mediation

31. Agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations.

32. The mediator should report to the criminal justice authorities on the steps taken and on the outcome of the mediation. The mediator's report should not reveal the contents of mediation sessions, nor express any judgment on the parties' behaviour during mediation.

VI. Continuing development of mediation

33. There should be regular consultation between criminal justice authorities and mediation services to develop common understanding.

34. Member States should promote research on, and evaluation of, mediation in penal matters.

GUIDELINES FOR A BETTER IMPLEMENTATION OF THE EXISTING RECOMMENDATION CONCERNING MEDIATION IN PENAL MATTERS

Introduction

1. At the Third Summit of the Council of Europe (Warsaw, May 2005), the Heads of State and Government undertook to make “full use of the Council of Europe’s standard-setting potential” and “promote implementation and further development of the Organisation’s legal instruments and mechanisms of legal co-operation”. They also decided “to help member states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes”.

2. In the light of these decisions, the CEPEJ, one of whose aims in its Statute is “to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice”, has included among its priorities a new activity directed towards facilitating effective implementation of Council of Europe instruments and standards regarding alternative dispute settlement.

3. The Working Group on Mediation (CEPEJ-GT-MED)² was therefore set up to gauge the impact in member states of the relevant recommendations of the Committee of Ministers, namely:

- Recommendation Rec(98)1 on family mediation,
- Recommendation Rec(2002)10 on mediation in civil matters,
- Recommendation Rec(99)19 concerning mediation in penal matters,
- Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties,

and to recommend specific measures for facilitating their effective implementation, thus improving implementation of the mediation principles contained in these recommendations.

4. This document concerns Recommendation Rec(99)19 concerning mediation in penal matters. The three other Recommendations, which concern family mediation, mediation in civil matters and alternatives to litigation between administrative authorities and private parties, require a specific approach and are examined in separate documents.

5. At the first meeting of the Working Group (Strasbourg, 8-10 March 2006), a questionnaire was drawn up to determine member states’ awareness of the above Recommendations and the development of mediation in their countries in accordance with the principles contained therein. The questionnaires were sent to 16 representative states.

² The CEPEJ-GT-MED is composed as followed: Ms Nina BETETTO (Slovenia), Ms Ivana BORZOVÁ (Czech Republic), Mr Peter ESCHWEILER (Germany), Ms Maria da Conceição OLIVEIRA (Portugal), Mr Rimantas SIMAITIS – President - (Lithuania), Mr Jeremy TAGG (United Kingdom), Ms Anna WERGENS (Sweden).

6. 52 replies were received to the questionnaire from member states and from practitioners and a report was drawn up by Mr Julien LHUILLIER (France), scientific expert, summarising those responses. However, limited information was supplied on mediation in penal matters. Since the adoption of the Recommendation, the concept and scope of mediation in penal matters has developed, and a broader concept of “restorative justice” has emerged, including “victim-offender mediation”³. Therefore, it is suggested that further work should be undertaken on updating the Recommendation. Before doing so, it would be necessary to have a fuller evaluation of the impact of restorative justice in member states based on up-to-date and comparable data.

7. As might be expected, there are considerable differences between member states in the way that victim-offender mediation has advanced, particularly because of the following obstacles:

- lack of awareness of restorative justice and mediation,
- lack of availability of victim-offender mediation before and after conviction,
- power to refer parties to mediation limited only to a single criminal justice institution,
- relatively high cost of mediation,
- lack of specialized training and disparities in qualifications of mediators.

8. In the light of these obstacles and in view of the fact that restorative justice processes may serve as an alternative to conventional justice, and as a tool for conflict management, but also in view of its potential to repair harm and to reduce reoffending, the Working Group has drawn up the following non binding guidelines to help member states to implement the Recommendation concerning mediation in penal matters.

1. AVAILABILITY

9. To expand equal availability of mediation services, measures should be taken to promote and set up workable mediation schemes across as wide a geographical area as possible, at all stages of the criminal justice procedure, including the execution of sanctions.

1.1 Support of mediation projects by member states

10. Member states should recognise and promote existing as well as new workable mediation schemes by financial and other forms of support. Where successful mediation programmes have been established, member states are encouraged to expand their availability by information, training and supervision.

³ See also UN Basic principles on the use of Restorative justice Programmes in Criminal Matters ECOSOC Res 2000/14 and Res 2002/12. The term “offender” which is, for practical reasons, used throughout the recommendation and these guidelines would also cover the alleged offender, for example, the accused or any person charged with a criminal offence.

1.2. Role of the judges, prosecutors and other criminal justice authorities

11. Judges, prosecutors and other criminal justice authorities have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite victims and/or offenders to use mediation and/or refer the case to mediation. Member states are encouraged to establish and/or improve co-operation between criminal justice authorities and mediation services to reach victims and offenders more effectively.

1.3. Role of social authorities and non governmental organisations

12. Member states are encouraged to recognise social authorities, victims support organisations and other organisations engaged in the criminal justice system, since they have an important role in promoting restorative justice and mediation. Where applicable, such bodies may invite victims and/or offenders to use mediation. They may for example have a role in conducting mediation, in offering different forms of restorative justice as well as in supporting the parties.

1.4. Role of lawyers

13. The codes of conduct for lawyers should include an obligation or a recommendation for lawyers to take steps to provide relevant information and, where appropriate, suggest the use of victim-offender mediation to parties and plead for referral to mediation by the competent authorities.

1.5. Quality of mediation schemes

14. It is essential for judges, prosecutors and other criminal justice authorities when referring parties to mediation, for lawyers when advising clients, and for the general public confidence in the mediation process that the quality of mediation is assured.

15. It is important that member states continually monitor their mediation schemes and on-going pilot projects and arrange for their external and independent evaluation. Certain common criteria, including both qualitative and quantitative evaluation aspects, should be developed to enable the quality of mediation schemes to be compared. Legislators and/or criminal justice authorities of member states are encouraged to identify possible consequences of mediation and mediated agreements on criminal procedures.

16. In view of the imbalance of power between the victim and the offender following a crime, member states should be aware that the needs of the victim require special consideration before, during and after the mediation. For this reason, member states are recommended to carry out further research and developments in this matter.

1.6. Confidentiality

17. The duty of confidentiality should be binding for the mediator at all stages of the mediation process and after its termination. Whenever this duty is subject to exceptions⁴, these exceptions should be clearly defined by legislation.

18. Member States should provide for legal guarantees of confidentiality in mediation. The breach of the confidentiality duty by the mediator should be considered as a serious disciplinary fault and be sanctioned appropriately.

1.7. Mediators' qualifications

19. Member states and/or mediation stakeholders should provide adequate training programmes for mediators and, taking into account the disparities in training programmes, set up common standards concerning the training.

20. As a minimum, the following items should be covered in mediation training:

- principles and aims of mediation,
- attitude and ethics of the mediator,
- phases of the mediation process,
- basic knowledge of criminal justice system
- the relationship between criminal justice and mediation,
- indication, structure and course of mediation,
- legal framework of mediation,
- skills and techniques of communication and of work with victims, offenders and others engaged in the mediation process, including basic knowledge on reactions of victims and offenders,
- skills and techniques of mediation,
- adequate amount of role plays and other practical exercises,
- specialist skills for mediation in cases of serious offences and offences involving minors,
- various methods of restorative justice,
- assessment of knowledge and competence of the trainee.

21. This training should be followed by supervision, mentoring and continuing professional development.

22. Member states should recognise the importance of establishing common criteria to permit the accreditation of mediators and/or institutions which offer mediation services and/or who train mediators. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.

⁴ See in particular Recommendation Rec(99)19 concerning mediation in penal matters, paragraph 30.

23. As certain member states encounter problems where the quality of training of mediators is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for mediators and for mediation trainers (for example, a European training centre). This could be facilitated by the Council of Europe in co-operation with the European Union.

1.8 Participation and protection of minors

24. Member states should recognise the importance of supporting and protecting minors during their participation in the mediation process by the establishment of adequate safeguards and procedural guarantees.

25. Member states should work together to examine, evaluate, and identify good practices in order to establish specific guidelines to the participation of minors in mediation in penal matters. This could be facilitated by the Council of Europe in co-operation with the European Union.

26. These specific guidelines should include:

- a. the relevance of the child's age or mental maturity and its consequences for the involvement of the minor in the mediation procedure;
- b. the role of parents, in particular in those situations where parents may oppose participation in mediation;
- c. the involvement of social workers, psychologists and/or legal guardians in mediation when minors are present.

1.9 Codes of conduct

27. Member states should take measures to ensure the uniformity in the concepts, scope and guarantees of the main principles of mediation such as confidentiality and others within their countries, by legislative measures and/or by developing codes of conduct for mediators.

28. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that a special Code of Conduct shall be elaborated with respect to the particularities of mediation in penal matters.

1.10 Breaches of codes of conduct

29. Where mediators breach a code of conduct, member states and mediation stakeholders should have in place appropriate complaints and disciplinary procedures.

1.11 International mediation

30. Discharges based on mediated agreements should have the same status as judgments or other judicial decisions, if they are taken by official judicial staff, e.g. member of the office of the public prosecutor or judge. Such a

decision will preclude prosecution in respect of the same facts in another member state (ne bis in idem).

2. ACCESSIBILITY

2.1. The rights of victims and offenders

31. In order to enable victims and offenders to take part in mediation, members States should take all necessary steps to ensure that their rights are protected and that they are fully aware of their rights. Mediation requires the free and informed consent of both victims and offenders, and should never be used if there is a risk that mediation may disadvantage one of the parties. Due consideration should be given not only to the potential benefits but also to the potential risks of mediation for both parties and in particular for the victim⁵.

32. Special effort should therefore be made to ensure that information about victim-offender mediation is clear, complete and timely.

This information should contain:

- the process of the mediation itself;
- the rights and obligations of users;
- the legal effects of mediation.

33. The parties in mediation should, in particular, be fully informed of the possible consequences of the mediation procedure on the judicial decision making procedure, including discontinuation of the criminal procedure, suspension or mitigation of the sanction imposed on the alleged offender. Also, in cases where victims are particularly vulnerable, they should be made aware of the possibility of conducting a mediation without face-to-face contact with the offender.

2.2. Cost of the mediation for the users

34. In order to make mediation accessible, member states should ensure direct financial support to mediation services via legal aid and/or other means. Exceptionally, in those member states where the offender has to finance partly his/her participation in mediation, member states should ensure that his/her contribution remains proportionate to his/her income. A costly mediation procedure not covered by legal aid might be an obstacle to mediation.

2.3. Suspension of limitation terms

35. In order to make mediation accessible, its use should not be prevented by the risk of expiry of limitation terms. In order to rectify this problem, member states are encouraged to consider implementing provisions for the suspension of limitation terms.

⁵ See Recommendation Rec(2006)8 on assistance to crime victims, item 13.

3. AWARENESS

36. It appears from the questionnaire responses that lack of awareness about restorative justice among the judiciary, prosecutors and other criminal justice authorities, victim support organisations, legal professionals, victims and offenders and the general public is one of the main obstacles to the development of mediation.

37. In order for the Recommendation on mediation in penal matters to be accessible to policy makers, academics, mediation stakeholders and mediators, it is vital that it is translated and disseminated in the languages of all member states.

38. It is recommended that CEPEJ creates a special page on mediation in its website. It could include translated text of the Recommendation, its explanatory memorandum and other relevant texts of the Council of Europe concerning mediation, assessment of the impact in countries of the Recommendation on mediation in penal matters. This special page could also include information on the monitoring and evaluation of mediation schemes and mediation pilot projects, list of mediation providers in member states, useful website links, etc.

3.1. Awareness of the general public

39. Member states, NGO's and other mediation stakeholders should take appropriate measures to raise awareness of the benefits of the mediation among the general public.

40. Such measures may include:

- Articles/information in the media,
- dissemination of information on mediation via leaflets/booklets, internet, posters,
- mediation telephone helpline,
- information and advice centres,
- focused awareness programmes such as "mediation weeks",
- seminars and conferences,
- open days on mediation at courts and institutions which provide mediation services

41. Member states, universities, other academic institutions and mediation stakeholders should support and promote scientific research in the field of mediation and restorative justice.

42. Mediation and other forms of restorative justice should be included in schools national curricula.

3.2. Awareness of the victims and offenders

43. Members of the judiciary, prosecutors, the police, criminal justice authorities, lawyers and other legal professionals, social workers, victims support organisations as well as other bodies involved in restorative justice

should provide early information and advice on mediation to the victims and offenders, accentuating the potential benefits and risks to both.

3.3. Awareness of the police

44. Since the police intervene during the early stages of a case, and are therefore the first to be in contact with the victims and offenders, their training should include an understanding of restorative justice. Specific consideration should be given to the matter of referring cases to mediation. This could be achieved by training including information on perpetrators and victims, as well as through the distribution of leaflets/brochures.

3.4. Awareness of the judiciary and prosecutors

45. An increasing number of member states have adopted legislative measures to allow judges and prosecutors, on an equal footing, to invite victims and/or offenders to use mediation and/or refer the case to mediation. For this reason, these two bodies should be fully informed of the mediation procedure and conscious of its advantages and possible risks. This could be achieved via information sessions and initial and continuous training programmes.

46. It is important to foster both institutional and individual links between mediators and judges/prosecutors. This can be done in particular by conferences and seminars.

3.5. Awareness of the lawyers

47. Restorative justice and mediation should be included in the curricula of initial as well as continuous training programmes for lawyers.

48. Bar associations and lawyers associations should have lists of mediation programmes providers and disseminate them to lawyers.

49. Member States and Bar associations should take measures to create legal fee structures that do not discourage lawyers from advising clients to use mediation in settling disputes.

3.6. Awareness of social workers

50. Member states are encouraged to take measures to raise the awareness of social workers to restorative justice and mediation.

ALTERNATIVES TO LITIGATION BETWEEN ADMINISTRATIVE AUTHORITIES AND PRIVATE PARTIES

Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties

(Adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies)

1. The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,
2. Considering that the aim of the Council of Europe is to achieve a greater unity between its members;
3. Recalling Recommendation No. R (81) 7 on measures facilitating access to justice, which in its appendix called for measures to encourage the use of conciliation and mediation;
4. Recalling Recommendation No. R (86) 12 concerning measures to prevent and reduce the excessive workload in the courts, which calls for encouraging, in appropriate cases, the use of friendly settlement of disputes, either outside the judicial system altogether or before or during legal proceedings;
5. Considering, on the one hand, that the large amount of cases and, in certain states, its constant increase can impair the ability of courts competent for administrative cases to hear cases in a reasonable time, within the meaning of Article 6.1 of the European Convention on Human Rights;
6. Considering, on the other hand, that the courts' procedures in practice may not always be the most appropriate to resolve administrative disputes;
7. Considering that the widespread use of alternative means of resolving administrative disputes can allow these problems to be dealt with and can bring administrative authorities closer to the public;
8. Considering that the principal advantages of alternative means of resolving administrative disputes may be, depending on the case, simpler and more flexible procedures, allowing for a speedier and less expensive resolution, friendly settlement, expert dispute resolution, resolving of disputes according to equitable principles and not just according to strict legal rules, and greater discretion;
9. Considering, therefore, that in appropriate cases it should be possible to resolve administrative disputes by means other than the use of courts;
10. Considering that the use of alternative means should not serve administrative authorities or private parties as a means of avoiding their obligations or the rule of law;

11. Considering that, in all cases, alternative means should allow judicial review, as this constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration;

12. Considering that alternative means to litigation must respect the principles of equality and impartiality and the rights of the parties;

13. Recommends that the governments of member states promote the use of alternative means for resolving disputes between administrative authorities and private parties by following, in their legislation and their practice, the principles of good practice contained in the appendix to this recommendation.

Appendix to Recommendation Rec(2001)9

I. General provisions

1. Subject of the recommendation

i. This recommendation deals with alternative means for resolving disputes between administrative authorities and private parties.

ii. This recommendation deals with the following alternative means: internal reviews, conciliation, mediation, negotiated settlement and arbitration.

iii. Although the recommendation deals with resolving disputes between administrative authorities and private parties, some alternative means may also serve to prevent disputes before they arise; this is particularly the case in respect of conciliation, mediation and negotiated settlement.

2. Scope of alternative means

i. Alternative means to litigation should be either generally permitted or permitted in certain types of cases deemed appropriate, in particular those concerning individual administrative acts, contracts, civil liability, and generally speaking, claims relating to a sum of money.

3. Regulating alternative means

i. The regulation of alternative means should provide either for their institutionalisation or their use on a case-by-case basis, according to the decision of the parties involved.

ii. The regulation of alternative means should:

a. ensure that parties receive appropriate information about the possible use of alternative means;

b. ensure the independence and impartiality of conciliators, mediators and arbitrators;

- c. guarantee fair proceedings allowing in particular for the respect of the rights of the parties and the principle of equality;
 - d. guarantee, as far as possible, transparency in the use of alternative means and a certain level of discretion;
 - e. ensure the execution of the solutions reached using alternative means.
- iii. The regulation should promote the conclusion of alternative procedures within a reasonable time by setting time-limits or otherwise.
 - iv. The regulation may provide that the use of some alternative means to litigation will in certain cases result in the suspension of the execution of an act, either automatically or following a decision by the competent authority.

II. Relationship with courts

- i. Some alternative means, such as internal reviews, conciliation, mediation and the search for a negotiated settlement, may be used prior to legal proceedings. The use of these means could be made compulsory as a prerequisite to the commencement of legal proceedings.
- ii. Some alternative means, such as conciliation, mediation and negotiated settlement, may be used during legal proceedings, possibly following a recommendation by the judge.
- iii. The use of arbitration should, in principle, exclude legal proceedings.
- iv. In all cases, the use of alternative means should allow for appropriate judicial review which constitutes the ultimate guarantee for protecting both users' rights and the rights of the administration.
- v. Judicial review will depend upon the alternative means chosen. Depending on the case, the types and extent of this review will cover the procedure, in particular the respect for the principles stated under section I.3.ii.a, b, c, and d, and/or the merits.
- vi. In principle and subject to the law, the use of alternative means should result in the suspension or interruption of the time-limits for legal proceedings.

III. Special features of each alternative means

1. Internal reviews

- i. In principle, internal reviews should be possible in relation to any act. They may concern the expediency and/or legality of an administrative act.
- ii. Internal reviews may, in some cases, be compulsory, as a prerequisite to legal proceedings.

iii. Internal reviews should be examined and decided upon by the competent authorities.

2. Conciliation and mediation

i. Conciliation and mediation can be initiated by the parties concerned, by a judge or be made compulsory by law.

ii. Conciliators and mediators should arrange meetings with each party individually or simultaneously in order to reach a solution.

iii. Conciliators and mediators can invite an administrative authority to repeal, withdraw or modify an act on grounds of expediency or legality.

3. Negotiated Settlement

i. Unless otherwise provided by law, administrative authorities shall not use a negotiated settlement to disregard their obligations.

ii. In accordance with the law, public officials participating in a procedure aimed at reaching a negotiated settlement shall be provided with sufficient powers to be able to compromise.

4. Arbitration

i. The parties should be able to choose the law and procedure for the arbitration within the limits prescribed by law. Subject to the law and the wishes of the parties, the arbitrators' decisions can be based upon equitable principles.

ii. Arbitrators should be able to review the legality of an act as a preliminary issue with a view to reaching a decision on the merits even if they are not authorised to rule on the legality of an act with a view to it being quashed.

GUIDELINES FOR A BETTER IMPLEMENTATION OF THE EXISTING RECOMMENDATION ON ALTERNATIVES TO LITIGATION BETWEEN ADMINISTRATIVE AUTHORITIES AND PRIVATE PARTIES

Introduction

1. At the Third Summit of the Council of Europe (Warsaw, May 2005), the Heads of State and Government undertook to make “full use of the Council of Europe’s standard-setting potential” and “promote implementation and further development of the Organisation’s legal instruments and mechanisms of legal co-operation”. They also decided “to help member states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes”.

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3. The Working Group on Mediation (CEPEJ-GT-MED)⁶ was therefore set up to gauge the impact in member States of the relevant recommendations of the Committee of Ministers, namely:

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- Recommendation Rec(2002)10 on mediation in civil matters,
- Recommendation Rec(99)19 concerning mediation in penal matters,
- Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties,

and to recommend specific measures for facilitating their effective implementation, thus improving implementation of the mediation principles contained in these recommendations.

4. This document concerns Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties. The three other Recommendations concerning family mediation, mediation in civil matters and mediation in penal matters may require specific approach and are examined in separate documents.

5. At the first meeting of the Working Group (Strasbourg, 8-10 March 2006), a questionnaire was drawn up to determine member States’ awareness of the above Recommendations and the development of alternatives to litigation between administrative authorities and private parties in their countries in accordance with the principles contained therein. The questionnaires were sent to 16 representative States.

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6. 52 replies were received to the questionnaire from member States and from practitioners and a report was drawn up by Mr Julien LHUILLIER (France), scientific expert, summarising those responses.

7. It is suggested that further work should be undertaken on updating the Recommendation and its explanatory memorandum, in particular concerning the concept and definitions of mediation and conciliation. Before doing so, it would be necessary to have a fuller evaluation of the impact of alternatives to litigation between administrative authorities and private parties in member states based on up-to-date and comparable data.

8. As might be expected, there are considerable differences between member States in the way that alternatives to litigation between administrative authorities and private parties have advanced, particularly because of the following obstacles:

- member States are unaware of the potential usefulness and effectiveness of alternatives to litigation between administrative authorities and private parties;
- therefore few efforts have been made in order that administrative authorities are aware of the advantages of these means, which can lead to creative, efficient and sensible outcomes;
- distrust of the courts to the development of non-judicial alternatives to litigation in the administrative field;
- lack of awareness of various alternative dispute resolution means in this specific field;
- lack of specialized neutrals in this area;
- little academic research has been undertaken on alternatives to litigation in administrative field.

9. In the light of these obstacles, the Working Group has therefore drawn up the following non binding guidelines to help member states to implement the Recommendation on alternatives to litigation between administrative authorities and private parties..

1. AVAILABILITY

10. Alternatives to litigation between administrative authorities and private parties will only become established in member States if a policy that addresses the use of these means of dispute resolution is adopted, either to prevent disputes before they arise or to resolve them subsequently.

11. These means must be available and in, order to expand their availability, measures should be taken to promote and set up workable schemes.

1.1. Role of member States

12. Member States, namely Governments and administrative authorities, play a central role concerning the promotion of the use of alternative means for resolving disputes with private parties, concerning individual administrative acts, contracts, civil liability or other issues of controversy.

13. Member states are encouraged to define when and how it is appropriate to use such alternative means as internal review, conciliation, mediation, negotiated settlement and arbitration

14. Member States should adopt specific measures to promote the use of alternative means of dispute resolution either by their institutionalisation or their use case-by-case.

15. When necessary, they should adopt legislation or adapt the existing legislation according to the principles in the Recommendation, for example making internal reviews, conciliation, mediation and negotiated settlement compulsory in certain cases.

16. Member States should encourage the use of internal reviews, conciliation, mediation and negotiated settlement as a prerequisite to the commencement of legal procedures.

17. Member States should encourage administrative authorities to propose alternative means of dispute resolution when available and not against existing law to resolve issues in dispute with private parties.

18. Member States should encourage administrative authorities to review standard agreements for contracts, grants and other assistance to authorize and encourage the use of alternative means of dispute resolution.

19. When required by private parties, administrative authorities should accept to submit the issue in dispute to an alternative dispute resolution means available, unless this procedure is against public interest or is abused by a private individual.

1.2. Support of alternatives to litigation between administrative authorities and private parties projects by member States

20. States should recognise and promote alternatives to litigation between administrative authorities and private parties schemes, by financial support or other form of support, to ensure they provide a quality service and a balanced involvement of all concerned parties (officers or employees representing public authorities, private parties, recognized neutrals associations, researchers, bar associations, judiciary, legal professionals, etc)

21. Internal review, being an important means of preventing disputes before they arise, should be used before alternative dispute resolution procedures even when they are available.

1.3. Role of administrative authorities

22. Administrative authorities should, in their daily practice in relation to private parties, use internal review procedure for the expediency and/or legality of an administrative act.

23. Administrative authorities should use the most appropriate methods of alternative dispute resolution, with the agreement of the parties.

1.4. Role of the judge

24. Judges have an important role in the development of alternatives to litigation between administrative authorities and private parties. Where applicable, they should have the power to recommend alternatives to litigation, namely conciliation, mediation and negotiated settlement, and arrange information sessions. It is important therefore that these alternatives are available, either by the establishment of court annexed schemes or by directing parties to lists of neutrals.

25. In judicial review, judges must take into account parties' agreement unless it is against the public interest.

1.5. Role of lawyers

26. The codes of conduct for lawyers should include an obligation or a recommendation to consider alternative means of dispute resolution including alternatives to litigation between administrative authorities and private parties before going to court, in appropriate cases, and to give relevant information and advice to their clients.

27. Bar associations and lawyers associations should have lists of neutrals specialized in alternative means to litigation between administrative authorities and private parties and disseminate them to lawyers.

1.6. Quality of alternatives to litigation between administrative authorities and private parties schemes

28. It is important that schemes and on-going pilot projects are continually monitored and evaluated to ensure they respect the principles of equality and impartiality and the rights of parties. Certain common criteria of evaluation should be developed.

29. Member States should encourage public authorities to work together to facilitate, promote and coordinate the use of alternative dispute resolution between public authorities and private parties.

1.7. Neutrals' qualifications

30. It is essential for administrative authorities when proposing or accepting alternatives to litigation, for judges when referring parties to these means, for lawyers when advising clients, and for the general public's confidence that the quality of the services provided is ensured.

31. In order to ensure the principles of equality, impartiality and the rights of parties, neutrals - mediators, conciliators, negotiators and arbitrators - should not be permanent or temporary public officers or employees,

32. Taking into account the disparities in training programmes, member States should try to ensure that neutrals have adequate training programmes and should set up common standards concerning the training.

33. As a minimum, the following items should be covered in the training of neutrals:

- principles and aims of alternatives to litigation between administrative authorities and private parties,
- attitude and ethics of neutrals,
- characteristics, phases and aims of each means – mediation, conciliation, negotiated settlement and arbitration.
- indication, structure and course of the various alternatives to litigation between administrative authorities and private parties,
- legal framework of the various alternatives to litigation between administrative authorities and private parties,
- skills and techniques of communication and negotiation,
- skills and techniques of the various alternatives to litigation between administrative authorities and private parties,
- adequate amount of role plays and other practical exercises,
- peculiarities of alternatives to litigation between administrative authorities and private parties
- assessment of the knowledge and competences of the trainee.

34. This training should take into account the specific nature of mediators/conciliators, negotiators and arbitrators.

35. It is strongly recommended that this training should be followed by supervision, mentoring and continuing professional development.

36. Member States should recognise the importance of establishing common criteria to permit the accreditation of neutrals and/or institutions which provide alternatives to litigation between administrative authorities and private parties and/or who train neutrals. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.

37. As certain member States encounter problems where the quality of training of neutrals is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for neutrals (for example, a European neutrals training centre). This could be facilitated by the Council of Europe in co-operation with the European Union.

1.8. Codes of conduct

38. Member States should take measures to ensure the uniformity in the concepts, scope and guarantees of the main principles of alternatives to litigation between administrative authorities and private parties such as confidentiality, when applicable, and others within their countries.

39. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that special codes are developed for alternatives to litigation between administrative authorities and private parties.

1.9. Breaches of codes of conduct

40. Where neutrals breach a code of conduct, member states should have in place appropriate complaints and disciplinary procedures.

2. ACCESSIBILITY

2.1. Cost of the alternatives to litigation between administrative authorities and private parties for the users

41. Internal review, being normally the “first level” of solving disputes, should be free to encourage both parties to reach a consensual solution for the case without the intervention of a neutral or the courts.

42. Concerning other means, where the intervention of a neutral is necessary, the cost for the private parties should be reasonable and proportionate to the issue at stake. In order to make alternatives to litigation between administrative authorities and private parties accessible for the general public, member States should ensure some direct financial support to them. For reason of equality before the law and access to law, it is unacceptable for some categories of the population to be excluded from a service on financial grounds. For those with limited financial means, member States should be encouraged to make legal aid available for parties involved in the alternatives to litigation between administrative authorities and private parties in the same way that it would provide for legal aid in litigation.

2.2. Suspension of limitation terms

43. Parties should not be prevented from using alternatives to courts, except for arbitration, by the expiry of limitation terms.

44. Member States are encouraged to implement provisions for the suspension of limitation terms.

3. AWARENESS

45. It appears from the questionnaire responses that lack of awareness among member states, governments and administrative authorities, the judiciary, legal professionals, users of the justice system and the general public is one of the main obstacles to the development of the alternatives to litigation between administrative authorities and private parties.

46. In order for the Recommendation on alternatives to litigation between administrative authorities and private parties to be accessible to policy makers,

public officers and employees, academics, private parties stakeholders and neutrals, it is vital that it is translated and disseminated in the languages of all member States.

47. It is recommended that CEPEJ creates a special page on mediation and other alternatives to litigation in its website. It could include translated text of the Recommendations, their explanatory memorandum and other relevant texts of the Council of Europe, assessment of the impact in countries of the Recommendations concerned. This special page could also include information on the monitoring and evaluation of mediation and other alternatives to litigation schemes and pilot projects, list of mediation providers or neutrals in member states, useful website links, etc.

3.1 Awareness of general public

48. Member States, Government's officers or employees and neutrals should take appropriate measures to raise awareness of the benefits of the alternatives to litigation between administrative authorities and private parties among the general public.

49. Such measures may include:

- Articles/information in the media,
- dissemination of information on alternatives to litigation via leaflets/booklets, internet, posters,
- neutrals telephone helpline,
- information and advice centres,
- focused awareness programmes,
- seminars and conferences,
- open days at courts and institutions which provide these services

50. Member States are also encouraged to make information available to the general public on how to access and use alternatives to litigation between administrative authorities and private parties, in particular on the internet.

51. Member States should also note that court annexed alternatives to litigation between administrative authorities and private parties in practice appear to be an efficient means of raising awareness for the judiciary, legal professionals and users.

52. Member States, universities, other academic institutions and alternatives to litigation between administrative authorities and private parties stakeholders should support and promote scientific research in the field of these alternatives to litigation.

53. These alternatives to litigation should be included in schools national curricula.

3.2 Awareness of the users

54. Government officials and employees, members of the judiciary, prosecutors, lawyers and other legal professionals as well as other institutions involved in dispute resolution should provide information and advice on alternatives to litigation between administrative authorities and private parties.

55. In order to make these alternatives to litigation more attractive to users, member States may wish to consider diminishing, abolishing or reimbursing court fees in specific cases if alternatives to litigation are used to try to settle the dispute either before going to court or during court proceedings.

56. Member States may request from the private parties and from the providers of legal aid, before receiving legal aid for the litigation, to consider amicable settlements of the dispute, including these alternatives to litigation.

3.3 Awareness of the judiciary

57. Where judges play a role in alternatives to litigation between administrative authorities and private parties, it is essential that they have a full knowledge and understanding of the processes and their benefits. This may be achieved through information sessions as well as initial and in-service training programmes which include specific elements of these alternatives to litigation useful in day-to-day work of courts in particular jurisdictions.

58. It is important to foster both institutional and individual links between judges and neutrals. This can be done in particular by joint conferences and seminars.

3.4 Awareness of the lawyers

59. Alternatives to litigation between administrative authorities and private parties should be included in the curricula of initial as well as continuous training programmes for lawyers.

60. Member States and Bar associations should take measures to create legal fee structures that do not discourage lawyers from advising clients to use amicable dispute resolution methods. For example, fixed fees for specific cases could encourage early settlements, clients could pay the same fees to lawyers irrespective of whether a specific case is resolved by alternatives to litigation or through the traditional court process, higher rate of fees for lawyers may be payable if the settlement is achieved.

