



Strasbourg, 7 December 2007

CEPEJ(2007)14

European Commission for the Efficiency of Justice (CEPEJ)

Guidelines for a better implementation of the existing recommendation 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.

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.

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).

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.