

## **Comments on the Proposal for a Directive on Certain Aspects of Mediation in Civil and Commercial Matters**

1. I have been asked to comment on the proposal for a Directive which was issued by the European Commission in October 2004. Overall, I believe that the Directive, together with its Explanatory Memorandum and Commission Staff Working Paper, are helpful documents in promoting a sound understanding of mediation and in encouraging much greater use of mediation generally. Comments made at the Green Paper stage have been taken on board and, at the same time, the potentially substantial benefits of a wide-spread adoption of mediation have been recognised.
2. In paragraph 1.1.1 of the Explanatory Memorandum, the fundamental idea that access to justice should include promoting access to adequate dispute resolution and not just access to the judicial system has been accepted and adopted. This marks a very important recognition of a more expansive view of justice and the ways in which the needs of individuals and business can be met outside as well as within the Courts.

There is emphasis on ensuring a sound relationship between mediation and judicial proceedings and on providing the necessary tools for the courts to actively promote the use of mediation. This highlights what experience has shown elsewhere, namely that the courts have a crucial role to play in the development and availability of mediation in every jurisdiction. This is true of Scotland. There is much which the courts can do in this regard.

The Commission has excluded consideration of the mediation process itself and of the appointment or accreditation of mediators, in line with responses to the Green Paper. However, this does not detract from the importance of high standards of competence, adherence to codes of conduct, adequate training and other benchmarks to ensure quality of service.

3. In paragraph 1.1.2 of the Explanatory Memorandum, the Commission emphasises the importance of reducing uncertainty in the interaction between mediation and civil proceedings and asserts that a stable and predictable legal framework should contribute to putting mediation on an equal footing with judicial proceedings, preserving the possibility for parties to solve a dispute through the courts if mediation is unsuccessful. Again, this seems most sensible and is an approach which, in my view, should be adopted in Scotland. Indeed, in paragraph 1.1.4 of the Explanatory Memorandum, the Commission emphasises that mediation should not be viewed as simply an alternative to the court system, with the objective of saving public resources.

The Commission makes the clear point that mediation has a value in itself as a dispute resolution method and ought to be promoted independently as one of several dispute resolution methods available in a modern society and which may be the most suited for some, although not all, disputes. This is another fundamental proposition which, in my view, is clearly correct.

If such an approach can be adopted in Scotland, that would mark a significant shift in thinking and underscore the significant potential which mediation has to enhance the provision of

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effective dispute resolution in this jurisdiction. As the Commission says in paragraph 1.1.3, mediation holds “untapped potential as a dispute resolution method and as a means of providing access to justice for individuals and business”. I would suggest that the time has come to unlock that potential.

4. In paragraph 1.1.5, the Commission notes the economic benefits of mediation, in particular by lowering transaction costs for individuals and business and its contribution to more sustainable economic and social trends through the preservation of relationships between parties after a dispute has been solved.

I can speak to this from my own personal experience. In the past four weeks, I have had the privilege to be mediator in three disputes involving employment, commercial contracts and professional negligence. In each of these matters, it was important for all concerned to understand and recognise the significant impact on personal and business relationships which the dispute had had. In each, it was possible through the mediation process to restore relationships, in particular on a personal level, so that, in at least two of these matters, the parties could work together again to their commercial and/or personal benefit. In one case, this will make a significant difference to a former employee’s ability to get back into the workplace and in another to the ability of two businesses to market a very important product which brings significant benefits to Scotland’s economy. In one, a significant saving was made in Legal Aid costs which would otherwise have been committed to a lengthy court proof and in the outlays incurred by the insurance underwriters which, if repeated over the long term, might well beneficially impact on premiums.

5. In the preamble to the proposed Directive, the Commission state, in paragraph (6), that the mediation process can be tailored to the needs of the parties and that settlement agreements reached during mediation are more likely to be enforced voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. This accords with my experience. The vast majority of mediations produce a satisfactory outcome and I am unaware of situations in which agreements reached at mediation have subsequently failed. Similarly, I am aware that, in each mediation, the circumstances are different and that the process is ideally suited to tailoring to the needs of parties. For example, circumstances may influence the number of meetings held, the place where they are held, their duration, the people who attend and the way in which meetings are conducted. This requires competence and quality of service, but the process can be remarkably successful when conducted well.
6. The Commission makes proposals for the protection of confidentiality in the mediation process (paragraph (9) of the preamble and Article 6). In principle, this is a very good thing. In Scotland, there is already protection of this kind for family mediation. This should be extended, in principle, to all mediations. Without this kind of protection, parties may not engage openly and frankly in discussion with the mediator, which is the essence of the process. It accords with protection given to extra judicial negotiations, in any event, as a matter of public policy. I would comment that it would perhaps be better for the protection provided in Article 6 to extend to all communications in regard to mediation rather than just the named examples. I have a slight concern about Article 6 paragraph 3(a), where it is suggested that evidence from the mediator will be compellable where there is a dispute between the parties about the implementation or enforcement of the agreement reached by them in mediation. I rather suspect that prudence

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would dictate that, even in these circumstances, the mediator's evidence ought not to be disclosed or admitted.

7. In paragraph (10) of the preamble and Article 5, the Commission proposes that it should be possible for settlement agreements to be confirmed in a court judgement or other authentic instrument by a court or public authority. I do not believe that agreements reached in mediation need to have special provision for enforceability. An agreement reached in mediation should be treated like any other agreement reached consensually by parties: if the parties agree to making it enforceable in some way, that is a matter for the parties. If they do not, there should be no special rule. In any event, in Scotland, we have the Books of Council and Session in which agreements can be recorded if parties so decide. In short, I believe that all extra judicial agreements which achieve settlement should be treated in the same way, whether or not reached with the help of an outside facilitator. In any event, in Article 5 of the proposed Directive, it seems that the Commission is only suggesting such a mechanism "upon request of the parties". If all the parties need to consent, the proposal may be unexceptionable.
8. In paragraph (12) of the preamble and Article 7, the Commission makes proposals to suspend limitation periods. I tend to the view that this is unnecessary and, indeed, may give rise to significant disputes about the time when limitation was suspended and/or resumed. There is no suspension of time running for ordinary negotiation. There is potential for abuse in this proposed change. If necessary, a writ can be served to avoid limitation with everyone made aware that that is the purpose of it, if negotiations are current, whether in mediation or by conventional means. This is consistent with viewing mediation as an enhanced or extended form of negotiation. In any event, it might be important to remember that one reason for short periods of prescription and limitation of actions is to avoid a situation in which courts are required to adjudicate where vital evidence has been lost, or memories dimmed, by the passage of time. So a balance may need to be struck between encouraging mediation by suspending the running of time and protecting the effective working of the court system.
9. The Commission emphasises at paragraph 13 of the preamble to the proposed Directive that preserving the flexibility of the mediation process and the private autonomy of the parties is an important objective. That is absolutely correct. To help with self regulation, the Commission has published a European Code of Conduct. This seems to be a rather legalistic document and Core Mediation has, for example, chosen to incorporate or modify parts of it in its own Code of Conduct. It is, however, a start in recognising the central elements of good conduct for mediators across Europe.
10. In Article 2(a), second paragraph, the proposed Directive states that the term "mediation" shall not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute. This is a most helpful statement. In Scotland, in small claims and summary cause matters, sheriffs are encouraged by the rules of court to seek to negotiate a settlement between the parties. Occasionally, this has been referred to as a form of mediation by judges. Given the judicial function and role, it is entirely inappropriate to describe this as mediation and the Directive's clarification on this point is welcome.
11. In Article 3, paragraph 2, the proposed Directive preserves the possibility of national legislation making the use of mediation compulsory or subject to incentives or sanctions (provided these will not impede the right of access to the judicial system). This is helpful in that it leaves open the

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use of various means to encourage parties to try mediation when that is appropriate, as has occurred for example in the English courts and which has been the subject of discussion in formulation of a possible new rule for the Sheriff Court. Mediation is a new process and parties may well need encouragement to make use of it, especially when the court or the legislature takes the view that it is in the interests of justice and an effective justice system that such encouragement is given.

12. In Article 4, paragraph 2, the Commission mentions training, in order that mediators are able to effectively conduct a mediation “in the manner expected by the parties”. At the early stages of the development of mediation, it is not entirely clear what expectations parties may have, nor that these will be particularly well informed. It would be preferable to substitute for these words the following: “competently and according to accepted standards of conduct”.

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