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

**ADVANCING LEGAL AND JUDICIAL APPROACHES  
TO MEDIATION  
IN CIVIL, FAMILY AND COMMERCIAL MATTERS  
ON MALTA**

**Seminar organised by the Chamber of Advocates (Valetta, 26 February 2004)**  
**and**  
**Conference organised by the Judicial Studies Committee (St Julians, 28 February 2004)**

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**RECOMMENDATIONS BY THE COUNCIL OF EUROPE**

**1. Legislation**

As regards regulatory framework, allowing for mediation, national authorities should take into account Council of Europe's Recommendation number R(98)1 on family mediation with explanatory memorandum and Recommendation Rec(2002)10 on mediation in civil matters with explanatory memorandum.

Since the basic principle of mediation is self determination of the parties and to that principle related flexibility of the mediation process which enables parties to control the mediation outcome, 'de fault' rules such as for example Model law on international commercial conciliation adopted by United Nation commission on international trade law could be inserted into national law, governing mediation.

Legal regulation, following a preliminary experiment in a form of a pilot court-annexed mediation program might ensure likelihood of the legislative action. Experience of various jurisdictions in Europe shows that it is easier to decide on a policy being implemented by using information about the results of previous experimental mediation program.

**2. Court annexed mediation program**

The judiciary has a pivotal role in a diversion cases away from adjudication to mediation. In order to provide public trust to the mediation as a new procedure, courts should design for certain period and type of cases court annexed mediation schemes.

By introducing court annexed mediation as an experimental pilot program which operates within a learning organisation it is possible for the program to be adjusted, confirmed or extended on the basis of the strengths and weaknesses, determined by the analyses of the program. Flowchart of questions to be answered as to how to design court annexed mediation program, is enclosed.

**3. Co-operation between judges and lawyers**

Mediation is an opportunity for extra earnings and new professional challenge for practising lawyers. Lawyers should be provided with adequate training in order to be licensed as qualified mediators. Special training program for lawyers on how to represent the clients in a mediation procedure should be organised for lawyers as well.

Mutual co-operation between judges and lawyers in supporting, organising and performing mediation is of key importance.

**4. Training**

Initial and continuing training of mediators is crucial for the quality of mediation services. Minimum professional requirements such as a previous professional experience, fixed number

of hours of training, observation of mediation sessions and co-mediation with experienced mediator should be determined.

In order to design national training program for mediators, participation of prospective trainers in the train of trainers program is recommended.

## **5. Participation of the parties**

Mediation should be in principle voluntary for the parties. In order to encourage parties to enter into mediation process national authorities could carefully consider possibility of automatic assignment of certain cases to mediation, referral discretion of a judge, cost sanctions for the party which wouldn't participate in good faith or which would refuse to participate unless good cause shown. However, a right of the parties to opt out of mediation should be guaranteed to the reasonable extent.

## **6. Funding**

Every mediation program needs to be supported by a firm and continuing funding.

Adequate resources should be allocated to the mediation provider.

Mediation fees could to certain extent be recommended however they could raise various relevant issues when mediation is compulsory for the parties.

When mediation operates within the court funding from the court's budget is necessary.

Addition:

- How to design the programme of court-annexed mediation

# HOW TO DESIGN THE PROGRAMME OF COURT-ANNEXED MEDIATION

## **I. NEEDS ASSESSMENTS**

### 1. The problems of parties to the dispute:

- costs are too high – judicial protection is difficult to access;
- lost illusions about the fairness of the judicial system;

### 2. The problems of the Bar

- competition, adversity;
- low quality of preparation stage for civil action;
- increasing advocate's costs;

### 3. Court problems:

- backlogs;
- backlogs in certain types of civil cases;
- the burden of the court material costs is too high;
- increase the quality of dealing with certain cases by alternative procedures;

### 4. How to assess the needs?

- collecting statistical data
- analysis of concluded settlements in court;
- questionnaires for judges and advocates.

## **II. IDENTIFICATION OF COURT OBJECTIVES**

Decrease the court burdening by:

- removal of cases from judicial proceedings;
- use of non-court neutral persons (the significance of the cooperation of advocates);
- moving the settlement into an earlier stage of judicial proceedings;
- improving the efficiency of proceedings (ENE) and the quality of pre-judicial and judicial proceedings (family mediation) by:
  - encouraging the advocates and parties to pay attention to the dispute earlier (earlier sessions, exchange of information),
  - improving participation of parties in civil action;
  - accelerate the case (time, money);
- expanding the accessibility to different ways of alternative dispute resolution and increasing satisfaction and public trust in the judicial system

## **III. FUNDAMENTAL QUESTIONS REGARDING THE CONTENTS**

### 1. What kind of mediation would the court like?

- facilitating;
- evaluating (implications for training of mediators and other participants (advocates, judges));
- will the court itself provide ADR, or will the cases be assigned to private ADR institutions;

- will the programme provide for compulsory participation of parties, or will it be based on the principle of voluntariness with the following options:
  - automatic assignment of certain cases with the opt-out option;
  - judge's assessment and decision for ADR procedure with consultation with the parties;
  - judge's consultation with the parties and assignment of the case with the party's consent (the importance of screening);
  - the case is assigned only when parties require so;

(each system of assigning cases, which bases on the judge's assessment, requires judges qualified for mediation)

(each system which generates more assignments, such as automatic assignment of cases, requires additional resources, particularly regarding the number of mediators)

- will any types of cases be excluded from the mediation programme in advance?

## 2. How will the programme be financed?

(budget, foundation, donations, mediation fees) – the latter would be questionable in the compulsory programme of mediation).

## 3. Who will be mediators?

- advocates;
- other lawyers;
- qualified court staff;
- judges (in their own cases or in other judges' cases?).

## 4. If advocates are mediators:

- will the court keep a list of advocates (mediators)?
- how will an advocate be selected for a mediator and by whom?
- what qualifications should he/she have?
- who will define the criteria for qualifications?
- what kind of training will be required?
- how should advocates-mediators' qualifications be demonstrated on the basis of training?
- who will monitor the work carried out by advocates, mediators? Who will delete them from the list?
- what ethical rules will have to be followed and who will define them?
- according to which standard will the occurrence of the conflict of interests be provided for?
- will they have immunity?
- will there be any restrictions regarding the frequency of implementation of mediations for individuals?
- will pro-bono service be required?

## 5. If judges are mediators:

- will they be mediators in their own cases? If not, how will the cases be assigned to other mediators?
- what kind of training should the judges attend as mediators?
- where can they obtain additional knowledge?
- problems in connection with judges – mediators:
  - mediator may define legal questions, however, he/she is not allowed to interpret law;
  - mediator is not bound by the law, but the parties define the contents of the agreement, irrespective of what the law says;
  - it is difficult for judges to ignore the law;

- judges are not good listeners, they make decisions on the basis of concise and focused information, however, mediation bases on listening – therapeutic fairness. The party has the right to tell everything that they can not tell at the court;
- the nature of judges is more evaluative than reserved;
- parties expect evaluative mediation but only until they hear the assessment;
- judge shopping – only in mediation.

6. If mediators are other non-court persons, how will cases be allocated to them?

- Will parties be able to choose mediators? (will this enhance the parties' trust in mediation procedure?)
- Can the court guarantee the quality of mediators by allocating the cases?
- Does mediation require mediators who are qualified for the mediation procedure, or mediators who are qualified for the questions which are the subject of the dispute?
- What procedure will be used for elimination in case of conflict of interests?

7. What level of confidentiality will be guaranteed in mediation?

- confidentiality between the parties to the dispute (separate sessions – nothing unless parties agree otherwise) or the contrary;
- confidentiality in relation to judicial proceedings (the problem of evidence prohibition – everything that is said or submitted in writing such as views, proposals, admission of facts, readiness to settle, should remain confident also in relation to judicial proceedings. (The evidence referring to such statements or information is unlawful.);
- procedural prohibition or confidentiality statement;
- confidentiality in relation to the court (mediation outcome, lack of good faith);
- what communication, if any, is allowed between the mediator and the court? (judge or programme administrator?)

8. What type of mediation rules will be defined?

- How detailed should the rules be?
- Will they be issued as a regulation, special programme or general instructions?
- Who will write the rules?

9. How will advocates and parties to the dispute be informed about the mediation programme?

- training programmes;
- who? when? what contents?
- information in writing (brochures, informative guide).

10. Will parties have to pay the mediation service?

- If yes, will a certain number of mediators carry out the services pro-bono?
- If yes, will the number of mediations allocated to mediation be sufficient?
- Will the parties consider mediation as more serious if they have to pay for it? Will additional costs put them off mediation?
- Are charging and compulsory participation in mediation compatible?
- Who will define the costs? Court, mediator?

## **IV. KEY ADMINISTRATIVE QUESTIONS**

1. Who will manage the programme?

- judge;
- specialised staff member;

- another authorised court person;
  - an individual outside the court, if the latter, what type of responsibility will be required;
  - selection and training of mediators;
  - allocating cases to mediators;
  - monitoring the progress in the procedure;
  - monitoring mediator's success;
  - assessment of the programme efficiency.
2. Will the court start with the pilot experimental programme?
- for what period;
  - for what type and scope of the cases?
3. How will the programme be integrated into the regular allocation of cases and case management?
- at which stage of the procedure will the court offer mediation (after filing the answer to the suit, any other time later during the procedure, during the appellate procedure)?
4. Will there be time restrictions for the mediation programme and who will control observance of these restrictions?
5. Mediation procedure elements:
- parties submit information;
  - specific period of time of mediation duration or the number of sessions with the parties;
  - the presence of parties is required, sanctions for non-observance;
  - participation in good faith is required;
  - production of evidence is suspended;
  - inclusion of other participants (witnesses);
  - how intensively does the court want to supervise the mediation process?
  - to what extent will the court allow mediators and parties to design the procedure and rules regarding an individual case?
6. Training of judges and court staff
- Does the court have a sufficient number of qualified court staff or judges for mediation management?
  - Who will train the staff?
  - How will the judges be qualified?
  - Identification of cases suitable for mediation;
  - Procedure details;
  - How to deal with the problems during mediation procedure?
7. What will be the extent of cases the programme intends to include in mediation (sufficiency of resources for quality services, sufficient number of mediators)
8. Where will mediation be carried out?
- at the court;
  - out of court;
  - will the parties be entitled to choose the place?
  - who will provide logistics?

9. Screening conference (the best method to persuade parties to try mediation)

- who will carry out the conference (judges are the most appropriate as the parties take them seriously, a day at the court)?
- sessions with all parties or separate sessions (the latter particularly when the advocate can not persuade the party to decide for mediation);
- the role of screening is that the party chooses facilitating or evaluating mediation (it is important that the party is informed)

## **V. MONITORING AND EVALUATION OF THE PROGRAMME**

1. Programme evaluation shall be planned when the programme is designed

- information about the time of the case resolution;
- information on party satisfaction;
- information on the costs of ADR procedure.

2. Comparison of cases allocated to mediation with the other cases, which were not allocated to mediation

- random sample of both types of cases;
- less reliable is the method of comparing the cases finished prior to the introduction of mediation and after the introduction of mediation.

3. Objectives of the programme evaluation

- who should be consulted about the questions to which the programme evaluation should answer?
- who has the overview of the overall programme evaluation?
- who is responsible for defining how the programme evaluation should be managed?
- who will be responsible for the assessment what kind of changes are required and how they should be implemented?
- who will monitor the observance of mediation standards?
- will the court implement its own evaluation or will it seek external help? (questionnaires for parties and advocates)?

4. Monitoring and implementation of the concluded agreements

- gentle reminder (how does the agreement, you concluded operate?)

5. Appellate procedure

Who makes decisions about appeals related to violation of the rules on mediation professional ethics?