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COMMISSION OF THE EUROPEAN COMMUNITIES

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2004/0251 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Directive of the European
Parliament and of the Council on certain aspects of mediation in civil and commercial
matters**

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1. BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM (2004)718 final – 2004/0251 (COD): 22.10.2004

Date of the opinion of the European Economic and Social Committee: 9.6.2005

Date of the opinion of the European Parliament, first reading: 29.3.2007

Date of adoption of the common position: 28.2.2008

2. OBJECTIVE OF THE COMMISSION PROPOSAL

On 22 October 2004, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil or commercial matters. The purpose of the proposed Directive is to facilitate access to dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings. The proposal constitutes one of the follow-up actions to the Green Paper on alternative dispute resolution presented by the Commission in 2002, the other being the European Code of Conduct for Mediators, established by a group of stakeholders with the assistance of the Commission and launched in July 2004.

3. COMMENTS ON THE COMMON POSITION

The Commission proposal covered the use of mediation in both cross-border and internal disputes because it considered that it would be neither feasible nor desirable to promote mediation only in relation to disputes that display a cross-border element.

However, the text of the Council's common position is the result of negotiations between the three institutions and a majority in both the Council and the European Parliament supported limiting the scope of the Directive to cross-border cases because of a restrictive interpretation of Article 65 of the EC Treaty. In view of these circumstances and in a spirit of compromise, the Commission accepts the definition of the scope of the Directive as presented in the common position provided that the definition of cross-border cases is as broad as possible. The Commission considers that the common position enlarges the definition of cross-border

cases with respect to the two most important Articles of the Directive, i. e. Article 7 (confidentiality) and Article 8 (limitation and prescription periods).

As to the provisions on limitation and prescription periods in Article 8, the common position does not harmonise national rules on limitation and prescription periods but obliges the Member States to ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. A recital clarifies that this result has to be achieved despite the differences in national legislation. The common position therefore fulfils the same objective as the initial Commission proposal.

The Council's common position differs from the opinion of the European Parliament in first reading in particular with respect to the following amendment proposals.

The common position does not allow for an implementation of the Directive through voluntary agreements between the parties. The Commission fully agrees with this, as the Directive affects rules on judicial proceedings in the Member States which cannot always be modified by agreements between the parties.

The obligation to publish the European Code of Conduct for Mediators in the Official Journal, which was prevented by the fact that the Code of Conduct is not an act of the institutions, has been replaced by an obligation to publish the Code of Conduct on the Internet. In addition, the Commission is committed to including a reference to the Code of Conduct in the EU-Bulletin when it will inform about the adoption of the Directive. These obligations are acceptable to the Commission.

As to the review clause in Article 11, the common position requires the Commission's report to consider the development of mediation throughout the European Union, which is acceptable to the Commission.

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

4. CONCLUSION

The Commission accepts the common position in the light of the fact that it includes the key elements of its initial proposal.