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Strasbourg, 22 March 2006

CEPEJ-GT-MED(2006)4

European Commission for the Efficiency of Justice (CEPEJ)

Working group on mediation (CEPEJ-GT-MED)

Strasbourg, 8-10 March 2006

Meeting report

At its 1st meeting, the CEPEJ-GT-MED drew up a questionnaire on mediation aimed at assessing the impact in the member States of Council of Europe Recommendations on mediation.

The study will focus on 16 States and should enable the Working Group, from its 2nd meeting onwards, to draft specific measures aimed to ensure an effective application of the existing Recommendations.

1. The Working Group on Mediation (CEPEJ-GT-MED) of the European Commission for the Efficiency of Justice (CEPEJ) held its 1st meeting in Strasbourg from 8 to 10 March 2006.
2. The Working Group elected its Chair, Mr Peter ESCHWEILER (Germany).
3. The agenda and the list of participants are reproduced in Appendices I and II to the present Report. The terms of

reference of the CEPEJ-GT-MED are set out in Appendix III.

I. Information from the Secretariat

4. The Secretariat welcomed all the members of the new Working Group and, since virtually all the experts were taking part in a CEPEJ meeting for the first time, presented an overview of the work of the CEPEJ.

II. Tour de table on mediation in the Working Group members' own States

5. The Secretariat proposed that a tour de table be held so that the experts of the Working Group could describe the situation in their own States regarding the application of Council of Europe Recommendations on mediation, its introduction and functioning. Some working group members pointed out that their reply would essentially cover mediation in civil and family matters.

6. In the States still lacking a developed and generalised mediation system but working towards one, the Council of Europe's Recommendations were known and used to good effect to prepare a legal basis or to argue in favour of pilot projects.

7. Other States had already gone further in exploring mediation, generally by launching a number of pilot projects at the initiative of the courts. These projects had taken account of the principles generally recognised and laid down in the Recommendations, while not necessarily following the Recommendations, which nevertheless provided useful material for persuading justice ministries to establish legislation in this field.

8. In the States where mediation was considered and recognised as an effective alternative to judicial procedures, the process still had to be consolidated, particularly through common standards of quality. The Council of Europe's Recommendations provided a sound basis for laying down those quality standards. In this respect, they could be even more precise and concrete in their terms, particularly regarding the training of mediators, confidentiality etc.

9. Generally speaking, the experts were not necessarily familiar with the Recommendations but they acknowledged that the principles set out in them could have a real impact on the national legislations now being developed. However, the dissemination of these Recommendations had to be harnessed to the development of other factors such as adequate funding - as training mediators was expensive - or judges' recognition of the usefulness of these procedures.

III. Analysis of other institutions' work concerning mediation

10. The CEPEJ-GT-MED welcomed Mrs Katja LETZING, responsible for the European Commission's work on mediation at the Directorate General for Justice, Freedom and Security.

11. Mrs Letzing presented the *Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters*.

12. The European Commission representative thought that the work of the two institutions was complementary as the proposal for a Directive did not go into the details of the mediation procedure and was restricted to certain disputes, although a Recommendation and a Directive did not have the same binding force.

13. The proposal for a Directive established four basic principles: (1) invitation by the court to use mediation; (2) enforcement of settlement agreements; (3) confidentiality of the procedure; (4) suspension of limitation periods regarding the claim that was the subject matter of the mediation. The proposal was currently before the Parliament, which would decide whether it should be adopted and, where appropriate, what its scope should be, some time in 2006.

14. It was also to be noted that, at the same time, the European Commission had initiated the drafting of a code of conduct for mediators, which had been opened for signature and had secured some 60 signatures already. It was planned to hold a meeting of the network of mediators formed in this way at the beginning of 2007; the CEPEJ might usefully take advantage of this to organise consultation of these mediators on the measures that the CEPEJ-GT-MED might prescribe to fulfil its terms of reference.

VI. Working methods to be adopted by the CEPEJ-GT-MED to fulfil its terms of reference, in particular to assess the impact in the member States of existing Recommendations relating to mediation¹

15. The Secretariat presented document CEPEJ-GT-MED (2006) 2 containing ideas on methods for organising the work of the CEPEJ-GT-MED. The document proposed that its terms of reference might be fulfilled on the following lines:

§ firstly, *assessing impact* in the States of Recommendations on mediation: this would entail not only gauging the impact in the States of the legal instrument as such - ie assessing knowledge, dissemination and use of the text - but also gauging the impact of the principles set out in the Recommendations - ie assessing knowledge of them, their application and their relevance within the States' judicial systems;

§ secondly, *drafting specific measures* to ensure that the Recommendations were more widely publicised and disseminated in the States, and to ensure that the States effectively applied the principles set out in them - catering where necessary for the revision or updating of the principles or even the drawing up of supplementary texts.

16. The Secretariat also drew attention to the discussions held during the 7th meeting of the Bureau concerning the terms of reference of CEPEJ-GT-MED (paragraphs 13 to 17 of document CEPEJ-BU (2006)3). The Bureau thought that the tasks assigned to the Group were not to be limited solely to a study on familiarity with and use of these recommendations in member States; while putting forward concrete proposals, the Group should hold thorough prior discussion on mediation, assessing the various means of alternative dispute resolution and consider the States where mediation was not well developed.

17. An initial exchange of views between the members highlighted the following points:

§ it appeared that those working in the area of mediation in Europe were not necessarily familiar with the Recommendations on mediation. Assessing the Recommendations' impact in States would not take very long at all if the exercise was limited to ascertaining knowledge of the Recommendations among the various players in mediation. While keeping the content of the Recommendations as the guiding idea, it should be sought to identify the difficulties commonly encountered when setting up mediation procedures and, after assessing the obstacles to developing mediation in the States, propose solutions;

§ the Working Group would use the data obtained upon completion of the evaluation of judicial systems by the CEPEJ (2006 exercise), and particularly from part VII concerning alternative dispute resolution (questions 101 to 104 of the revised scheme – Document CEPEJ (2005) 2 Rev 2 -). However, it noted that, judging by some of the States' replies, certain questions were still very general and others might have given rise to differences of interpretation. It was proposed that Mrs I. BORZOVA (Czech Republic), member of the CEPEJ-GT-MED but also a member of the CEPEJ and national correspondent for the evaluation process, be assigned the task, where applicable, of raising certain questions and asking for clarifications at the meeting of national correspondents who would be examining the new draft report for evaluating judicial systems in Strasbourg from 22 to 23 May 2006;

§ owing to the disparities between systems of mediation in civil, family, penal and administrative matters, and even though some problems might be common to a number of them, it would be difficult to make a single evaluation covering the four Recommendations, for which the contact persons in the States were not necessarily the same;

§ the Working Group, in its present form, was made up mostly of experts specialising in civil and family matters;

§ given the diversity of mediation systems in Europe and their differing levels of development, it would not be possible to cut one of the questionnaires;

§ the diversity of those initiating and involved in mediation also made it difficult to determine who the questionnaire should be sent to. Sending it only to ministries of justice in the member States would not give a full picture of mediation in the States. It would also be interesting to obtain questionnaire replies from the different entities involved, for the same State, particularly where mediation existed outside the court framework and/or was handled by private bodies. It was pointed out in this connection that, in some countries, it was difficult to convince people to use mediation as a means of alternative dispute resolution. Those who initiated such methods would be interested by an exercise of the kind envisaged by the CEPEJ aimed at ascertaining the exact situation in the States by directly asking those involved in mediation.

18. With these considerations in mind, the CEPEJ-GT-MED decided to devote its 1st meeting to the preparation of a questionnaire to serve as a basis for its activities by providing, once completed, an overview of the situation in certain States where mediation was concerned. The questionnaire (Document CEPEJ-GT-MED (2006) 3) was divided into four sections², reflecting the themes of the Recommendations whose impact was to be assessed.

19. The Working Group chose not to include questions of a theoretical nature on mediation procedures in the questionnaire as it considered this information already available. It opted instead for questions establishing qualitative rather than descriptive data and focusing on the practical application of the principles set out in the text of the Recommendations.

20. In particular, the Working Group chose to focus on the following aspects: regulation, information, types of dispute concerned, cost, quality of services, training of mediators, confidentiality, role of the judge, binding nature of mediation, prescription, execution of mediation agreements, future developments and main expectations for mediation, current obstacles to its development.

21. As the Working Group's members considered that they were familiar with the workings of mediation and the different players involved in their respective States, it was decided that the impact study would be carried out initially in the States of origin of the CEPEJ-GT-MED experts and they would coordinate the replies where there were different respondents for the different sections of the questionnaire. The study would therefore initially cover: the Czech Republic, Germany, Lithuania, Portugal, Slovenia and the United Kingdom.

22. In addition, to ensure that a representative cross-section of Council of Europe member States was covered, the Working Group instructed the Secretariat to draw up a list of 10 other States for which the impact study would also be carried out. It proposed opting for States where mediation was practised at least in some areas or where the introduction of mediation faced difficulties that might be encountered by other States wishing to bring in mediation in the near future.

V. 2006 work plan of the CEPEJ-GT-MED

23. The Working Group agreed on the following work plan:

§ as some sections of the questionnaire required consultation with practitioners within States, particularly for mediation in penal matters or alternatives to litigation between administrative authorities and private parties, the Group's members were asked to carry out the necessary consultations and send their comments by 27 March 2006 to the Secretariat, which would finalise the questionnaire;

§ the deadline for replies to the questionnaire was set for 1 July 2006 and finalisation of the replies set for 1 September 2006; for the 10 States that were not the States of origin of the Working Group's members, the Secretariat was instructed to send the questionnaire to the Ministries of Justice of those States for information (with copy to the members of the CEPEJ) together with a letter requesting a list and the contact details of the main bodies responsible for mediation in their country. It was also decided to post the questionnaire on the CEPEJ internet site, inviting replies from mediators.

24. Between 1 September 2006 and the date of the next CEPEJ-GT-MED meeting, the members of the Working Group would analyse the replies and each prepare a contribution on concrete means and measures to improve the

impact of the Recommendations on mediation.

25. Given the substantial work entailed in processing questionnaire replies on four very distinct areas in sixteen European States, the Secretariat would look at how best to coordinate the replies so that they were readily useable by the experts, depending on the budget funding available to the CEPEJ in this area.

26. The Working Group nevertheless realised that there were no ready-made methods as such with a proven track record in assessing the impact of Council of Europe recommendations and it first had to devise them. Furthermore, assessing the situation in the member States in a field as complex and diverse as mediation might take longer than for another field if the aim was to have an accurate overall view of the situation. For that reason, it wished its terms of reference to be extended into 2007, were it not to complete all its tasks in 2006 through the two meetings planned for and the ongoing e-correspondence which it decided to set up between meetings.

APPENDIX I

1. Election of the Chairman
 2. Adoption of the agenda
 3. Information by the Secretariat
 4. Discussion concerning the elements to examine in order to assess the impact in the States of the existing Recommendations concerning mediation
 5. Analyse of the work of other institutions concerning the mediation
 6. 2006 working plan of the CEPEJ-GT-MED
- § Possible involvement of scientific experts/observers in the work of the Working Group
§ Next meeting: 6-8 November 2006
7. Other business

APPENDIX II

EXPERTS

Nina BETETTO, Supreme Court Judge, LJUBLJANA, SLOVENIA

Ivana BORZOVÁ, Head, Department of Civil Supervision, Ministry of Justice, PRAGUE, CZECH REPUBLIC

Graham COTTON, Head of ADR Projects, Civil Law and Justice Division, Her Majesty's Courts Service (HMCS),

LONDON, UNITED KINGDOM

Peter ESCHWEILER, President Judge, Regional Higher Court of Appeal, FRANCFURT AM MAIN, GERMANY, Chair of the CEPEJ-GT-MED / Président du CEPEJ-GT-MED

Maria da Conceição OLIVEIRA, Lawyer, LISBON, PORTUGAL

Rimantas SIMAITIS, Adviser, Court of Appeal, VILNIUS, LITHUANIA

Jeremy TAGG, Head of ADR Policy, LONDON, UNITED KINGDOM, Apologised / Excusé

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APPENDIX III

European Commission for the Efficiency of Justice (CEPEJ)

Terms of reference of the Working Group on mediation (CEPEJ-GT-MED)
adopted by the CEPEJ at its 6th plenary meeting

1. Tasks

Under the authority of the European Commission for the Efficiency of Justice (CEPEJ), the Working Group on mediation (CEPEJ-GT-MED) is instructed to enable a better implementation of the Recommendations of the Committee of Ministers concerning mediation.

In order to fulfil its tasks, the CEPEJ-GT-MED shall in particular:

- a. assess the impact in the States of the existing Recommendations of the Committee of Ministers concerning mediation, that are: Recommendation Rec (98) 1 on family mediation, Recommendation Rec (99) 19 concerning mediation in penal matters, Recommendation Rec (2001) 9 on alternatives to litigation between administrative authorities and private parties, Recommendation Rec (2002) 10 on mediation in civil matters;
- b. draft, if appropriate, guidelines and specific measures aimed to ensure an effective implementation of the existing Recommendations;
- c. taking into account the work of other institutions, and in particular the European Union, suggest, if appropriate, areas in which it could be useful to draft new international legal instruments or amendments to existing ones.

2. Composition

The CEPEJ-GT-MED shall be composed of 6 members of the CEPEJ or other experts appointed by the CEPEJ who have an in-depth knowledge in the field of mediation and other measures of alternative dispute resolution. Their travel and subsistence expenses will be borne by the budget of the Council of Europe. Other experts appointed by the member States might participate in its work, at their own expenses.

The relevant Council of Europe, in particular the European Committee on Legal Co-operation (CDCJ), and European Union bodies might be represented to the CEPEJ-GT-MED without the right to vote or defrayal expenses.

The non governmental organisations granted with the observer status to the CEPEJ might be invited by the Bureau to participate in the work of the CEPEJ-GT-MED, on a case-by-case basis, if the Bureau considers their attendance relevant for the quality of the work.

3. Working structures and methods

The CEPEJ-GT-MED will organise 2 meetings in 2006.

In carrying out its terms of reference, the CEPEJ-GT-MED may seek the advice of external experts and have recourse to studies by consultants.

4. Duration

These terms of reference expire on 31 December 2006.

1 These are Recommendations of the Committee of Ministers to Council of Europe member States Rec(98) 1 on family mediation, Rec(99) 19 concerning mediation in penal matters, Rec(2001)9 on alternatives to litigation between administrative authorities and private parties, Rec(2002) 10 on mediation in civil matters.

² (1) Questionnaire on family mediation, (2) Questionnaire on mediation in civil matters, (3) Questionnaire on mediation in penal matters, (4) Questionnaire on alternatives to litigation between administrative authorities and private parties

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