

**679** Meeting, 15[-16] September 1999  
10 Legal Questions

## 10.4 European Committee on Crime Problems (CDPC)

### c. Draft Recommendation No. R(99) ... concerning mediation in penal matters

CM(99)118 Addendum 2 (restricted) 2 August 1999

#### Summary

**1. Draft Recommendation No. R (99) ... concerning mediation in penal matters**

**2. Draft Explanatory memorandum there**

**Activity 1.17e of the Intergovernmental programme of Activities for 1999**

#### **DRAFT**

RECOMMENDATION NO. R (99) ..

**OF THE COMMITTEE OF MINISTERS TO MEMBER STATES**

**CONCERNING MEDIATION IN PENAL MATTERS**

*(adopted by the Committee of Ministers on ...*

*at the ... meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Noting the developments in member States in the use of mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings;

Considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community;

Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation;

Considering the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes;

Recognising that mediation requires specific skills and calls for codes of practice and accredited training;

Considering the potentially substantial contribution to be made by non-governmental organisations and local communities in the

field of mediation in penal matters and the need to combine and to co-ordinate the efforts of public and private initiatives;

Having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Bearing in mind the European Convention on the Exercise of Children's Rights as well as Recommendations No. R (85) 11 on the position of the victim in the framework of criminal law and procedure, No. R (87) 18 concerning the simplification of criminal justice, No. R (87) 21 on assistance to victims and the prevention of victimisation, No. R (87) 20 on social reactions to juvenile delinquency, No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families, No. R (92) 16 on the European Rules on community sanctions and measures, No. R (95) 12 on the management of criminal justice and No. R (98) 1 on family mediation;

Recommends that the governments of member States consider the principles set out in the appendix to this Recommendation when developing mediation in penal matters, and give the widest possible circulation to this text.

#### Appendix to Recommendation No. R (99)..

### **I. Definition**

These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

### **II. General principles**

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.
2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.
3. Mediation in penal matters should be a generally available service.
4. Mediation in penal matters should be available at all stages of the criminal justice process.
5. Mediation services should be given sufficient autonomy within the criminal justice system.

### **III. Legal basis**

6. Legislation should facilitate mediation in penal matters.
7. There should be guidelines defining the use of mediation in penal matters. Such guidelines should in particular address the conditions for the referral of cases to the mediation service and the handling of cases following mediation.
8. Fundamental procedural safeguards should be applied to mediation; in particular, the parties should have the right to legal assistance and, where necessary, to translation/interpretation. Minors should, in addition, have the right to parental assistance.

### **IV. The operation of criminal justice in relation to mediation**

9. A decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.
10. Before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision.
11. Neither the victim nor the offender should be induced by unfair means to accept mediation.
12. Special regulations and legal safeguards governing minors' participation in legal proceedings should also be applied to their

participation in mediation in penal matters.

13. Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.

14. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.

15. Obvious disparities with respect to factors such as the parties' age, maturity or intellectual capacity should be taken into consideration before a case is referred to mediation.

16. A decision to refer a criminal case to mediation should be accompanied by a reasonable time-limit within which the competent criminal justice authorities should be informed of the state of the mediation procedure.

17. Discharges based on mediated agreements should have the same status as judicial decisions or judgments and should preclude prosecution in respect of the same facts (*ne bis in idem*).

18. When a case is referred back to the criminal justice authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay.

## **V. The operation of mediation services**

### V.1. Standards

19. Mediation services should be governed by recognised standards.

20. Mediation services should have sufficient autonomy in performing their duties. Standards of competence and ethical rules, as well as procedures for the selection, training and assessment of mediators should be developed.

21. Mediation services should be monitored by a competent body.

### V.2. Qualifications and training of mediators

22. Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities.

23. Mediators should be able to demonstrate sound judgment and interpersonal skills necessary to mediation.

24. Mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system.

### V.3. Handling of individual cases

25. Before mediation starts, the mediator should be informed of all relevant facts of the case and be provided with the necessary documents by the competent criminal justice authorities.

26. Mediation should be performed in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. The mediator should always respect the dignity of the parties and ensure that the parties act with respect towards each other.

27. The mediator should be responsible for providing a safe and comfortable environment for the mediation. The mediator should be sensitive to the vulnerability of the parties.

28. Mediation should be carried out efficiently, but at a pace that is manageable for the parties.

29. Mediation should be performed *in camera*.

30. Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned.

#### V.4. Outcome of mediation

31. Agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations.

32. The mediator should report to the criminal justice authorities on the steps taken and on the outcome of the mediation. The mediator's report should not reveal the contents of mediation sessions, nor express any judgment on the parties' behaviour during mediation.

### VI. Continuing development of mediation

33. There should be regular consultation between criminal justice authorities and mediation services to develop common understanding.

34. Member States should promote research on, and evaluation of, mediation in penal matters.

## EXPLANATORY MEMORANDUM

### INTRODUCTION

#### 1. Background to mediation in penal matters

Towards the end of the twentieth century, a new type of conflict resolution has emerged rivalling the traditional approach of legal settlement. Consensual models of conflict resolution are being propagated as alternatives to the classical pattern of confrontation. This development is not restricted to a particular jurisdiction or a particular branch of the law. Rather, it touches on every legal domain and proliferates in most legal systems.

Consensual models for conflict resolution are not altogether new. The fact, however, that this policy of consensus is no longer a mere theoretical perspective for the distant future, but that it has found its way even into the criminal justice system, with its strong affinities to the state, may indicate that this approach has a strong and widespread appeal. The movement has been variously described as community justice, restorative justice, informal justice etc., but in practice it is most often referred to by means of the technique which most models have in common, which is "mediation" as distinct from legal adjudication.

The mediation movement of today draws support from different ideological sources and strands of thought. It has been stimulated from within as well as without the criminal justice system.

Some elements of negotiation have always existed, of course, within the criminal justice system. Such pragmatic approaches stand in contrast to those positions which, by way of organised mediation programmes, strive for conflict solutions which are more party- and community-oriented, more comprehensive and socially constructive, than traditional criminal procedures. The strength of the movement seems to derive from the fact that its support cuts across ideological and philosophical boundaries. The idea of mediation unites those who want to reconstruct long foregone modes of conflict resolution, those who want to strengthen the position of victims, those who seek alternatives to punishment, and those who want to reduce the expenditure for and workload of the criminal justice system or render this system more effective and efficient.

#### Models

Mediation in penal matters takes a great many forms. They blend into each other and there are many variations. The major models are as follows.

(1) Some form of what could be called "*informal mediation*" is carried out by criminal justice

personnel in the course of their normal work. This might be a public prosecutor who invites the parties to take part in an informal settlement, with the intention of discontinuing prosecution if a satisfactory agreement is reached. It might also be a social worker or probation officer working with a convicted person, who thinks that contact with the victim will make a greater impact on the offender; it might, on the other hand, be a police officer called out to a domestic dispute who may be able to defuse the situation without making a criminal charge. A judge may also choose to attempt an out-of-court settlement and then discharge the case. This kind of informal intervention is common to all legal systems, although the conditions under which it is possible will depend on particular national codes and regulations. Although it is sometimes frequent, it is not systematic or controlled and could be subject to bias and abuse. It also depends on the skills and inclinations of particular personnel and is therefore idiosyncratic. It can be a sensible way of helping the formal system operate more smoothly, but should not be confused with the organised models of mediation which are dealt with in this Recommendation.

(2) "*Traditional village or tribal moots*" are long-standing customary arrangements whereby the whole community meets together to resolve conflicts or crimes between its members, still common in less developed countries and rural areas. They depend on very strong integrated communities and are not generally applicable in modern societies. They tend to favour benefit to the community at large. They antedate Western law and have been the inspiration for many modern mediation programmes. The latter are often, in fact, an attempt to introduce the advantages of the tribal moot in a form which is compatible with modern social structures and legally recognised individual rights.

(3) When talking of mediation in penal matters, "*victim-offender mediation*" is the model that people most often have in mind. It involves the immediate parties (although there may be more than one offender or more than one victim) meeting in the presence of a specially appointed mediator (who may be voluntary or paid). The mediation may be performed with both parties present (direct mediation) or if the victim is not willing to meet the offender, in separate meetings with each party (indirect mediation). There are many variants of this model.

In some of these programmes the mediators are criminal justice personnel specially trained to carry out mediation, usually social workers or probation officers, but they may also be police officers, or staff of courts and public prosecutors' offices. In some programmes, independent mediators (professionals or volunteers) without a judicial function are used.

Victim-offender mediation may also be run by a special agency or authority, such as police, youth justice, probation service, public prosecutor, court or an independent community-based organisation. In the case of independent programmes, these may be based in organisations involved in victim support or in community-based treatment programmes for offenders, or may be set up specifically to carry out mediation. In some cases, the programme is run by a combination of agencies through an inter-agency steering committee.

This type of mediation may operate at any stage of a case. It may be associated with diversion from prosecution, be in conjunction with a police caution, occur parallel to prosecution, constitute part of a sentence or happen after sentence. An important difference is whether the mediation will or will not affect judicial decisions, as when discontinuation of prosecution depends on an acceptable settlement, or the agreement is put to the court as a recommended order or sentence. The need for control or judicial supervision is much greater if the mediation will have an impact on such decisions.

Some victim-offender mediation programmes apply to any type of offender, whereas others work only with juveniles or with adults, while a few work only with one type of offence, for instance shoplifting, robbery or violence offences. Some programmes are mainly aimed at minor offences or first-time offenders and yet others at more serious offences or even repeat offenders.

(4) "*Reparation negotiation programmes*" exist solely to assess compensation or reparation to be paid by an offender to the victim, usually at the instigation of a court, which will incorporate the

reparation in an order. They may involve a mediated meeting between the two parties, but are much more likely to use separate, relatively simple and brief negotiations with each party. Reparation negotiation programmes are not concerned with reconciliation between the parties, but only with the arrangement of material reparation. Some involve work programmes whereby offenders can earn money with which to pay compensation.

(5) "*Community panels or courts*": These programmes involve the diversion of criminal cases from the prosecution or courts to community procedures that are more flexible and informal, and often involve some element of mediation or negotiation. Local authorities may have their own boards for such mediation.

(6) "*Family and community group conferences*", which have been developed in Australia and New Zealand, represent a further example of community participation in the criminal justice system. They bring together not only the victim and the offender, but also relatives of the offender and other community support persons, certain agencies (such as the police and youth justice) and sometimes support persons for the victim. The offender and his or her family are expected to produce a comprehensive agreement, involving reparation, sanctions and obligations, that is satisfactory to the victim and which they believe will help keep the offender out of further trouble.

### Development

In the genealogy of modern mediation programmes, the north American models have acted as trend-setters, although they often incorporate ideas which have been developed elsewhere. Nevertheless, the transatlantic debate prompted the re-emergence of mediation in Europe.

The European development of mediation models is uneven across European countries and in most instances it is still at its initial stages. There is also a wide span between the models existing in various member States. In the United Kingdom, the dominant model has been victim-offender mediation, but there is a large diversity of programmes and models used. The legal constitution of the United Kingdom has allowed an extensive involvement of the community.

The continental European scene, still developing, is different in that the criminal justice authorities have been more engaged in developing mediation schemes from the outset, and the existing models are often linked to the criminal justice system and reflected in legislation. To mention but a few examples, in Austria, France and Germany there are mediation programmes in penal matters provided for in legislation, according to which criminal cases may be referred to "victim-offender mediation" by the prosecutor, which may result in discontinuation or discharge of the case. In Norway, the Mediation Boards strive to combine the advantages of mediation with those of a community forum. In practice these boards focus on juveniles. In Spain mediation/reparation programmes for juveniles have been developed by the social authorities within the framework of the criminal justice process. Indeed, the tendency to focus mainly on juveniles has been a prominent feature of mediation programmes across Europe. Often, mediation with juvenile offenders has paved the way for mediation with adults.

Mediation in penal matters is a promising concept which will continue to grow in Europe. Countries with a system in operation are likely to develop it further. In some countries mediation has been introduced recently. Several states are considering the possibility of introducing mediation as a legal option. The ongoing process calls for standards and guidelines in most member States of the Council of Europe.

## **II. The Council of Europe and mediation**

The development of various forms of mediation in several member States has been recognised by the Council of Europe and the need to examine mediation in a European context has been raised on several occasions. In 1998, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (98) 1 on family mediation, which highlights the advantages of such mediation and sets out principles for resolving family disputes by way of mediation.

The rise of mediation in *penal* matters can be retraced by way of examining recent Council of Europe recommendations and reports prepared under the auspices of the European Committee on Crime Problems (CDPC). Although not primarily dealing with mediation, several of the recent recommendations within the field of crime problems concerning, for example, the position of the victim in the framework of criminal law and procedure, assistance to victims and the prevention of victimisation, social

reactions to juvenile delinquency, simplification of criminal justice refer to and advocate the use of diversion, conciliation and other forms of out-of-court settlements, such as mediation, in certain situations.

In 1992, the CDPC proposed that a committee of experts on mediation in penal matters, with the objective to evaluate the mounting experience with mediation and to assess its role in relation to the "traditional" criminal justice system, be established. In 1993, the Committee of Ministers endorsed that proposal. Owing to budgetary constraints, the start of the work of the Committee was delayed. In the meantime, there were several requests from new member States, as well as observers, to participate in the Committee's work. The terms of reference were therefore amended.

The final terms of reference of the Committee of Experts on Mediation in Penal Matters (PC-MP) were adopted by the European Committee on Crime Problems at its 44<sup>th</sup> plenary session in 1995, and confirmed by the Committee of Ministers at the 543<sup>rd</sup> meeting of their Deputies in 1995. The terms of reference required the Committee to evaluate different models and programmes of mediation in Europe and to assess the role of mediation in relation to the "traditional" justice system. In particular, the following questions and areas of concern should be studied:

- the potential of mediation to arrive at conflict solutions which are more accepted by those involved (including or excluding society at large) than those solutions which are procured by a traditional criminal procedure;
- the role, training, professional status and degree of professionalisation of mediators;
- the areas of conflict which lend themselves to mediation as well as their underlying problem structure;
- the form and degree of integration into the criminal justice system;
- the relevance and practical implementation of due process requirements in mediation.

The Committee was composed of experts from Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Norway, Slovenia, Spain and Turkey. Representatives of Canada, the European Permanent Conference on Probation and Aftercare (CEP) and the World Society of Victimology, participated as observers. Ms Christa Pelikan (Austria) was elected Chair of the Committee. The Committee included representatives of ministries of justice, the judiciary, prosecution authorities and academics (law, criminology and sociology) as well as persons with practical experience in mediation. Two scientific experts – Mr Heike Jung (Professor of criminal law, *Universität des Saarlandes*, Germany) and Mr Tony Marshall (former Principal Research Officer, Home Office, United Kingdom) – were appointed to assist the Committee.

The Committee held five meetings between November 1996 and April 1999. The members of the Committee provided detailed written information on mediation in penal matters in their respective countries. In addition, written information was provided on mediation systems in countries not represented on the Committee. Accordingly, ample information on the legal framework, policy and practice in member States was available to the Committee. The text of the draft Recommendation and its Explanatory Memorandum were finalised at the fifth meeting of the Committee of Experts, held in April 1999, and submitted for approval and transmission to the Committee of Ministers at the 48<sup>th</sup> plenary session of the European Committee on Crime Problems (CDPC), held in June 1999. At the XX meeting of their Deputies (date), the Committee of Ministers adopted the Recommendation and authorised publication of the Explanatory Memorandum thereto.

#### **COMMENTARY ON THE PREAMBLE OF THE RECOMMENDATION**

The preamble emphasises the benefits of mediation in penal matters. In criminal matters, mediation should be seen as an option which is complementary to traditional criminal proceedings or even an alternative to them. Thanks to its flexibility and participatory nature, mediation is likely to produce a more comprehensive solution to the problems arising from crime than the criminal justice system can do alone. Seen as an alternative to traditional criminal proceedings and sentencing, mediation also has a potential to reduce the use of custodial sentences and, consequently, the costs of the prison system.

The preamble also reflects the objectives and the philosophy of mediation in penal matters. The involvement of the parties, i.e. normally the victim and the offender, as the main actors in a criminal case, is different from that in "traditional" criminal proceedings where the state and the offender are the main actors. One objective of mediation is thus to provide a possibility for the parties to handle their "own" conflict and solve it to their mutual satisfaction. This implies that the parties personally play a more active and constructive, sometimes innovative, role.

Participation in mediation proceedings enables the *victim* to receive a personal apology and explanation from the offender and to express his or her feelings. This often helps to assuage anger and fear, and thus contribute to greater healing in the long term. Furthermore, in mediation the victim is able to negotiate reparation in a more comprehensive context to suit his or her needs. The victim may get a more realistic understanding of the offender and his or her behaviour. Some victims may wish to respond to the offender's willingness to accept responsibility by expressing forgiveness.

From the *offender* perspective, the chance of facing the victim and being able to explain and make an apology is an important element in sensitising the offender to the harm he/she has done and to the pain and suffering he/she has inflicted upon the victim. In addition, through mediation the offender is given the possibility of having direct involvement in resolving the conflict and agreeing reparation (such as financial compensation), which may help to re-establish relations with the community. Thus, the offender's rehabilitation and re-integration into society are promoted by mediation.

Mediation provides a chance to bring the *community* closer to the criminal justice system by the participation of those who are directly concerned with the crime, by the use of voluntary mediators from the local community, and by the possibility of programmes run by community-based agencies. Community involvement may lead to a better public understanding of crime and consequently encourage community support for victims, rehabilitation of offenders and prevention of crime.

Mediation therefore shows that satisfying the interests of the victim, the offender and society at large is not incompatible. Socially constructive solutions are of benefit to all parties concerned. The conciliatory nature of mediation can assist the criminal justice system in fulfilling one of its fundamental objectives, namely contributing to a peaceful and safe society, by restoring balance and social peace after a crime has been committed.

The diversity and mix of public and private programmes in the field of mediation calls for co-ordination and co-operation supported by common standards. Mediation practices have accumulated a body of knowledge distinct from other practices related to criminal justice. But mediation must not be approached lightly. Mediators need training and experience in the use of specific skills. While mediation involves flexibility and diversity of action, its underlying principles should be enshrined in codes of practice. This would help ensure quality of service and credibility of mediation as such.

The reference to the European Convention on Human Rights in the preamble emphasises the relevance of the protection of individuals' fundamental rights. Mediation introduces a greater degree of flexibility into the criminal justice system. In some instances this may create a risk of overlooking or disregarding some of the current rules protecting individual rights. Mediation therefore needs to be accompanied by a number of safeguards as they are spelled out in the European Convention on Human Rights.

Furthermore, the preamble refers to other instruments of the Council of Europe, which in certain situations make reference to the use of mediation and similar schemes. Thus

- the European Convention on the Exercise of Children's Rights, requires, in its Article 13, the contracting parties to encourage the institutionalisation and the use of mediation procedures;
- Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure recommends member States to examine the possible advantages of mediation and conciliation schemes;
- Recommendation No. R (87) 18 concerning the simplification of criminal justice recommends member States to review their legislation to promote out-of-court-settlements;



- Recommendation No. R (87) 20 on social reactions to juvenile delinquency calls on governments to review their legislation and practice with a view to encouraging the development of diversion and mediation procedures;
- Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation recommends that member States encourage experiments (whether on a national or a local basis) in mediation between offenders and victims;
- Recommendation No. (92) 16 on the European rules on community sanctions and measures refers to measures which maintain the offender in the community through obligations alternative to deprivation of liberty (for example mediation);
- Recommendation No. (92) 17 concerning consistency in sentencing underlines that sentencing rationale in member States should be consistent with modern and humane crime policies in particular with respect to reducing the use of imprisonment by, *inter alia*, using measures of diversion such as mediation. It also considers the importance of ensuring the compensation of victims and
- Recommendation No. R (95) 12 on the management of criminal justice recalls that crime policies such as decriminalisation, depenalisation or diversion, mediation and the simplification of criminal procedure can contribute to addressing difficulties of criminal justice systems such as increase in workloads and budgetary constraints;
- Recommendation No. R (98) 1 seeks to promote family mediation.

It should be emphasised that the principles contained in the Recommendation, although sometimes rather elaborate, should be seen as providing guidance and a source of inspiration when developing domestic systems of mediation in penal matters. It is clear that a considerable margin of appreciation must be left to member States in order to make such mediation fit the legal tradition in each member State.

## COMMENTARY ON THE APPENDIX

### I. Definition

As a term of reference, "mediation" needs explanation. This has to do with the fact that various other terms are being used to describe programmes or approaches which, like mediation, aim at consensus. On the one hand, precision in definition is wanted. On the other hand, such a definition should take into account the existing diversity of programmes and models.

It helps to know that in France, for example, the term "*médiation*" is, in the context of legal processes, reserved, in principle, for the domain of the adult criminal justice system, whereas the term "*réparation*" describes similar practices in juvenile criminal justice. In Germany, discussion has been centred on the term "*Täter-Opfer-Ausgleich*" and, in Austria, the term "*Außergerichtlicher Tatausgleich*" is being used. The Norwegian model refers to "*konflikt and mediation*". In the United Kingdom "*mediation*" and "*reparation*" were originally used interchangeably and there is a growing tendency to refer more generally to "*restorative justice*". Such differences in terminology hint at differences in genesis, objective and framework of mediation programmes.

The term "mediation" in a general sense (i.e. not specific to a penal context) is normally reserved for a process of conflict resolution, involving intervention by an impartial third party with the intention of encouraging voluntary agreement between the parties.

In the Recommendation, *mediation in penal matters* is defined as a process whereby the victim and the offender <sup>footnote 1</sup> can be enabled, voluntarily, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party or mediator. The reference only to the victim and the offender as parties does not exclude other persons (legal and physical) participating in the mediation.

Such an approach may take various forms, and they are often combined with each other, for instance:

- \* a sharing of views so that victim and offender understand each other better;
- \* apology and voluntary agreement for the offender to make reparation to the victim;
- \* voluntary agreement by the offender to undertake some other action, such as work for the community or participation in a rehabilitation programme ("indirect reparation");
- \* resolution of any conflict between the victim and offender, or between their families or friends;
- \* a programme of agreed sanctions and undertakings which may be placed before a court as a suggested sentence or court order.

Mediation in penal matters may operate in direct or indirect forms, i.e. with the parties meeting together or being seen separately by the mediator. It may be carried out by professional mediators or by trained lay volunteers. Mediation may be carried out under the auspices of a criminal justice agency or an independent community-based organisation. The parties may be a victim and an offender (as in "classic" victim/offender mediation), or they may include their relatives, other community supporters and representatives of criminal justice agencies (as in the "family or community group conferences"). In all circumstances, it is essential that the mediator is *impartial* and that participation is *voluntary*.

## II. General principles

The general principles reflect the essential elements for mediation in penal matters. They clarify the important place of mediation within the criminal justice system, the main characteristics of mediation (voluntary participation and confidentiality) as well as its availability as a service to victims and offenders.

1. Since mediation has no chance of succeeding unless the parties are willing to participate, voluntary participation is a prerequisite for all forms of mediation. This distinguishes mediation from traditional criminal justice proceedings and indicates that the parties in mediation "own" their case to a large extent. Free consent must be given at the outset. Parties may withdraw their consent at any time. The criminal justice authorities and the mediator should make this clear to the parties before and at the beginning of the mediation respectively.

2. Mediation in penal matters cannot do without respecting the principle of confidentiality for two main reasons. On the one hand, it is a prerequisite for a fruitful exchange and constructive outcome. It facilitates an environment where the parties can safely bring in more aspects than may be advisable in traditional court proceedings. Such additional information is often the basis for reaching an out-of-court settlement. On the other hand, confidentiality protects the interests of the parties. The discussion during mediation should therefore not be made public, unless the parties agree. This stands in contrast with the requirement of a public hearing in traditional criminal proceedings and emphasises the "private character" of mediation. Confidentiality applies not only vis-à-vis the general public but also in relation to the criminal justice system. An exception from the principle of confidentiality is recognised in paragraph 30.

3. Up to now mediation has been managed on a rudimentary basis in many member States. In some countries it has become a more or less comprehensive service. It is important that the services are fully comprehensive for reasons of equality of access and quality of service. Therefore, the Recommendation calls on member States to promote mediation programmes, public or private, as a generally available service. This would, as a minimum, imply that mediation - whether public or private programmes - would be officially recognised by the states as a possibility, alternative or complementary to traditional criminal proceedings. Such programmes should normally have funding from a public budget (state and/or municipality) and there should normally be some kind of public accountability. The Recommendation does not go so far as to characterise mediation as a "right" however. It should be seen as a legal option which should be considered by the criminal justice authorities.

4. Mediation can be used at different stages of the criminal process. The availability of mediation at different stages varies considerably from country to country. While many programmes operate at any stage, others may be entirely associated with diversion from prosecution (conditional or otherwise), be in conjunction with a police caution, occur parallel to prosecution, constitute part of a sentence (eg an order to make reparation), or happen after sentence. It is recommended that mediation is available throughout the whole criminal justice process. This takes into account that the parties (particularly the victim) may not be ready to take advantage of mediation at an early stage. However, in many cases it is important to settle matters as soon as possible.

5. The autonomy of mediation services within the criminal justice system ensures that the mediation process operates on the basis of a different rationale from the "traditional" criminal justice system. Mediation services need sufficient autonomy to act flexibly and responsibly towards the parties.

Of course, mediation services cannot operate as if they were totally detached from the criminal justice system. Criminal justice agencies should have sufficient authority to perform their "gate-keeping" role and their ultimate responsibility for the legality of the process. This involves the assessment of issues of public interest and procedural rights and safeguards of the parties when making decisions both before and after mediation. In addition, there are individual rights that must be protected during mediation, which implies that the criminal justice authorities need to ensure monitoring of mediation practices.

### III. Legal basis

6. With a view to avoid over-regulating mediation and considering the various approaches to mediation in member States, the Recommendation does not explicitly require that mediation programmes should be laid down in law. Legislation should, however, as a minimum rule, make mediation possible and even facilitate its use.

#### Procedural rights and safeguards

Procedural rights and safeguards have to be taken into account during mediation. The extent, to which this should be laid down in law may depend on the legal tradition of the particular member State.

Mediation is of a less formal character than criminal proceedings are, in order to allow for a more personal and comprehensive approach to conflict resolution. This cannot, and should not, be regulated in detail. Yet, there are procedural rights and safeguards of the individuals in the criminal process which cannot be dispensed with in a society governed by the rule of law. Mediation, as an integral part of the criminal process, should therefore receive legal recognition and operate in conformity with the fundamental rights of the persons involved. The relevant regulation, in this respect, is, in particular, Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair trial, which reads:

*"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

*2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

*3. Everyone charged with a criminal offence has the following minimum rights:*

*a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

*b. to have adequate time and facilities for the preparation of his defence;*

*c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

*d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

It follows that Article 6 of the European Convention on Human Rights applies to all cases where a criminal charge is at stake. In principle, cases of mediation originating in a criminal charge would thus be covered. It needs to be discussed in more detail to what extent the various rights under Article 6 apply when mediation is used as an alternative to traditional criminal justice proceedings.

#### The right of access to a court (Article 6.1)

According to the "Deweere case" (European Court of Human Rights, Judgment of 27 February 1980, Series A, No 35) "the right to a court" (Article 6.1) is no more absolute in criminal than in civil matters and it could be subject to implied limitations, for example, a decision not to prosecute. Furthermore, according to the same judgment, such a right could be waived by the parties, as long as a high degree of vigilance is provided for such a waiver. Agreeing to mediation, in the context of a diversion procedure, may constitute a waiver of the "right of access to a court". The crucial consideration would thus be whether the waiver was made under proper circumstances.

The Recommendation therefore makes a distinction between "the operation of criminal justice in relation to mediation" (Section IV) and "the operation of mediation services" (Section V). That distinction is also reflected in the "legal basis" of mediation, paragraphs 7 and 8.

**7.** This paragraph concerns the *criminal justice authorities* which need to have guidelines indicating when mediation may be used. Such guidelines may indicate types of offences suitable for mediation or conditions related to the parties. It is, for example, necessary that the accused accepts relevant facts of the case. He or she may generally have to admit a degree of responsibility falling short of recognising criminal liability. Due to the principle of *presumption of innocence*, Article 6.2 ECHR, no decision on guilt may be taken by the criminal justice authorities without proper court proceedings, i.e. in compliance with Article 6. Domestic regulation should therefore focus on factual conditions of a case and safeguards for the parties, before and during the referral. The main considerations are listed in Section IV.

**8.** As to the operation of mediation provided by the *mediation services*, it is recommended that certain fundamental rights which apply during mediation should be explicitly regulated. Primary amongst these is the right to legal counselling/assistance, translation/interpretation and parental assistance (or if need be assistance by other representatives) for minors.

#### **IV. The operation of criminal justice in relation to mediation**

This Section of the Recommendation relates to the role of the criminal justice authorities and provides guidelines for their "gate-keeping" function.

**9.** Mediation in criminal cases should be dependent on a decision by the criminal justice authorities (normally the prosecution or the court). A "criminal case" would be at stake as soon as the crime has been reported to the police. The assessment of a mediation process, once it is finished, should also be reserved to the criminal justice authorities (cf. General Principles, paragraph 5).

**10.** It is crucial that parties, before agreeing to mediation, are fully aware of their "procedural situation", based on the facts of the case. They should also have the right to a comprehensive explanation of how the mediation procedure is going to be

performed, by what service or by whom, and its possible consequences, in terms of criminal justice decisions, of the different outcome of mediation (e.g. success, failure or partial settlement). The burden of information lies with the criminal justice authorities. Each party should be informed separately, if need be. Such information is necessary for the parties to be able to exercise *informed* consent, in conformity with paragraph 1.

**11.** Bearing in mind the general principle contained in paragraph 1, it is of the utmost importance that the consent to mediation by the parties must not be reached by "unfair means". The criminal justice authorities must make sure that the information given to the parties, referred to in paragraph 10, is objectively presented. They may not use any pressure against the parties in order to make them agree to mediation, and they should ensure that one party does not induce the other by threats etc. to agree to mediation. In short, the criminal justice authorities must make sure that no form of improper constraint influences the parties' agreement to mediation.

**12.** Special domestic regulations and legal safeguards that apply to minors in traditional criminal proceedings shall also apply to the process of referral of a case to mediation as well as during mediation. This rule implies a special monitoring function by the criminal justice authorities over the mediation procedure where minors are involved. The legal safeguards should in particular cover the rights to receive information, to express his or her views, to have a representative (parental or other), and to a speedy procedure. The criminal justice authorities must always consider the procedural issues, as well as the mediation as such with the best interest of the child in mind (see the United Nations Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights).

**13.** This rule excludes mediation in cases where one of the main parties is unable to comprehend the mediation process on intellectual grounds. These may be due to age or mental retardation or a similar handicap. The reference to the "main parties" implies that cases involving more than two parties may still be referred to mediation, even if one of the parties would not understand the process, provided that party only plays a minor role.

**14.** It is a normal requirement for mediation that the victim, as well as the accused, accepts the relevant main facts of the case. Without such a common understanding, the possibility of reaching an agreement during mediation is limited, if not excluded. It is not necessary that the accused, in addition, accepts guilt, and the criminal justice authorities may not pre-judge the question of guilt in order not to infringe the principle of the *presumption of innocence* (Article 6.2 ECHR). It suffices that the accused admits some responsibility for what has happened. Furthermore, it is emphasised that participation in mediation should not be used against the accused if the case is referred back to the criminal justice authorities after mediation. Moreover, an acceptance of facts or even "confession of guilt" by the accused, in the context of mediation, should not be used as evidence in subsequent criminal proceedings on the same matter.

**15.** Mediation may not be an appropriate procedure where there are obvious discrepancies between the parties. Mediation requires active participation by the parties and an ability to take decisions in their own interest in the course of negotiation. Large power imbalances, such as a relationship of dependency by one party on another, implicit or explicit threats of violence, would prevent free participation and true consent to agreement. It should be recognised, however, that many discrepancies in power and skills can be corrected by mediators who will seek to redress the balance in favour of disadvantaged parties.

**16.** The phenomenon of lengthy criminal proceedings is an acknowledged problem in several member States. Mediation has to be conducted at a pace which is comfortable for the parties. The time-limit specified in this rule ensures that the criminal justice authorities receive the necessary feed-back to make proper decisions within a reasonable time. If mediation has not been completed by this time-limit, the criminal justice authorities have to consider whether or not to resume normal criminal proceedings in conformity with the "celerity principle". (This would not always mean that the mediation cannot continue, on a private basis, if the parties so desire and are still in a position to do so; see also paragraph 28).

**17.** This rule applies when a case has been mediated successfully, the criminal justice authorities accept the result and, as a consequence, the criminal proceedings are brought to an end (order not to prosecute or for the discontinuance of the proceedings). Such a decision by the criminal justice authorities should make it impossible that the case (the same facts) be brought up again (*ne bis in idem*), provided that the agreement is implemented and that the decision has acquired legal force.

**18.** If mediation is unsuccessful in bringing about an agreement between the parties, or where an agreement is reached but not complied with by the parties, the criminal justice authorities normally proceed with their proceedings. In accordance with paragraph 16, lengthy proceedings should be avoided: the continuation of the case should be decided without delay.

#### **IV. The operation of mediation services**

This section deals with the handling of mediation once a criminal case has been referred to mediation and the case is thus no longer under the immediate control of the criminal justice system. This section also provides general guidelines for mediation in cases which are not originating in the criminal justice system.

##### V.1. Standards

**19.** The Recommendation reflects the view that mediation should be regulated only to the extent necessary and that mediation services should be given independence and autonomy in performing their duties. However, considering that it is recommended that mediation should be a generally available service, there is a need for some standard setting concerning the organisation of mediation services as well as for the operation of mediation. Such standards should preferably be recognised by the state, municipality or other body of public character. It is not necessary that they are made into law or regulations. However, some kind of official recognition would be preferable.

**20.** Within the framework described in paragraphs 19 and 21, the mediation service should have sufficient autonomy to develop standards concerning qualifications of the personnel, codes of conduct and/or ethical codes for performing mediation. It is also recommended that procedures for recruitment of mediators and systems for evaluating their performance be developed. Such measures would provide for a necessary degree of professionalism of the service.

**21.** In the light of its recognised standards, the mediation service should be monitored by an independent organ. This monitoring could be performed by the criminal justice authorities. However, the recommendation only refers to "a competent body" which does not exclude other authorities.

##### V.2. Qualifications and training of mediators

The recommendation, in respect of qualification and training, only specifies a minimum level of requirements referring to the background and personal skills of a potential mediator and the objectives of the training. Member States would be expected to develop more extensive standards and guidelines (such standards already exist in a few member States).

**22.** Mediators (professionals or volunteers) should, as far as possible, represent all sections of society in the areas where they are supposed to work. In particular, they should be recruited from all social groups, including ethnic and minority groups. Both sexes should be represented. The mediators should preferably possess a good all-round knowledge, in particular concerning the local environment in which they are active. Education and qualifications are not necessarily the most important elements in selecting mediators. The Recommendation makes no reference to minimum age, although provision to that effect may be appropriate at national level.

**23.** As to the personal skills of mediators, the recommendation mentions "sound judgment", which would normally be related to a high degree of maturity. "Interpersonal skills" necessary to mediation would, for instance, include an open attitude towards people, ability to listen and to communicate, and to remain impartial. Such abilities should be reflected in selection and training procedures.

**24.** All mediators need a minimum level of initial training, and their training should continue throughout the course of their work. The contents of their training should be linked to the standards of the mediation service. Such training should aim at developing the specific skills and techniques needed for conflict resolution. In addition, the training should provide for a good understanding of the general problems of victims and victimisation which, for example, can be obtained from victim support groups, as well as problems concerning offenders and related social problems. The institutionalisation of training would not only be beneficial for mediators in their work; it would also contribute to higher standards of mediation.

##### V.3. Handling of individual cases

**25.** At the outset of the mediation, the mediator needs an adequate picture of the factual circumstances of the case. This information, provided by the criminal justice authorities, is necessary, in the first place, to define precisely the offence to which the mediation is related, and secondly, to assist the mediator in assessing whether the case is suitable for mediation. Additional information concerning the parties, which is relevant to decisions on mediation, should be submitted to the extent necessary and possible, according to domestic legislation, if the parties agree.

**26.** Mediation should be performed in an *impartial* manner. This implies that the mediator does not take sides but seeks to help the parties to participate fully and derive benefit from mediation. Impartiality also implies that the mediator does not appear to be partial from the perspective of the parties because of personal links with one of the parties or previous involvement in the case. Accordingly, a person should not be appointed mediator if he/she has personal links with the parties or if he/she is personally involved in the case. The emphasis on impartiality does not in principle exclude criminal justice personnel from performing mediation. However, the prosecutor in charge of a case should not act as a mediator in the same matter.

The requirement of impartiality does not imply that the mediator should be indifferent to the fact that the offence has been committed and the wrongdoing of the offender. The parties of mediation in penal matters are, thus, unlike parties in mediation in civil matters, initially unequal with the main obligations resting on the offender's side. However, in relation to the principle of the presumption of innocence, the mediator must take no position on the question of guilt.

**27.** This rule implies a responsibility for the mediator to ensure that the place of mediation is chosen in the interests of the parties, i.e. normally a neutral place. The meeting should be controlled in such a way that the parties remain respectful of each other and are able to feel safe and comfortable. The vulnerability of the parties should be carefully considered in that context. If the requirements of this paragraph cannot be satisfied, the case is not suited to mediation. In such a situation mediation should be ended and the case referred back to the criminal justice authorities.

**28.** Mediation, as an integral part of the criminal justice process, should be carried out efficiently. As one of the arguments for introducing mediation in penal matters is to increase efficiency of the system, mediation should proceed with all due speed within the limits set by the capacities and wishes of the parties.

**29.** This paragraph, which specifies the principle of confidentiality (see also General Principles, paragraph 2), suggests that mediation sessions, as a rule, should not be open to the public, the objective being that of providing confidence between the parties and the mediator (see also paragraph 32).

**30.** In case of imminent serious crime, a balance must be struck between the principle of confidentiality (General principles, paragraph 2) and the need to prevent serious harm or damage. Therefore, the principle of confidentiality does not extend to imminent serious crime that may be revealed during mediation. In such a case, the mediator should inform the proper authorities, which will often, but need not necessarily, be the criminal justice authorities. In some cases it may be advisable to inform the persons concerned. Like other citizens the mediator, in such cases, should have an obligation to comply with the requirements of domestic law pertaining to the reporting and prevention of such crimes.

#### V.4. Outcome of mediation

**31.** There are three main requirements for an agreement after mediation: it should be voluntary, reasonable and proportionate.

The requirement that agreements through mediation should be completely *voluntary* is absolute. This distinguishes mediation from adjudication and arbitration, where an impartial person listens to the parties and may encourage greater informality and flexibility than the courts, but comes up with his or her own decision. The requirement that agreements should be voluntary does not exclude the mediator, however, from playing an active role in reaching the agreement.

The requirement of a *reasonable* obligation implies some relationship between the offence and the type of obligation on the offender.

The *proportionality* requirement means that, within rather wide limits, there should be correspondence between the burden on the offender and the seriousness of the offence; for instance, compensation should not be excessive.

**32.** After the mediation process is concluded, the mediator should report to the criminal justice authorities on the procedural steps taken during mediation and on the outcome. In the case of an unsuccessful outcome, the report should, if possible, indicate briefly the reasons. However, according to the principle of confidentiality, the report should not reveal the contents of statements and behaviour of the parties during mediation. The report should preferably be in written form, ideally following a standard formula.

### VI. Continuing development of mediation

**33.** Mediation is a relatively new phenomenon in most European countries. It needs to have a wide acceptance by society at large as well as by the criminal justice system with which it will work closely. Common understanding and mutual respect are of the utmost importance. In particular, there is a need to show that mediation brings additional qualities to the criminal justice procedure, and the mediation services must be able to demonstrate a high level of competence. In order to achieve this, regular contacts and consultations between members of the mediation services and members of the criminal justice system (including ministries of justice, courts, prosecution and police) should be encouraged.

**34.** Closely linked to the recommendation in paragraph 33, is that concerning research and evaluation. *Research* is concerned, *inter alia*, with procedures of objective description and assessment. Research is essential for gaining knowledge on the functioning of mediation. Without such knowledge, there is no trustworthy basis for describing and assessing the extent to which such measures are being used and the results. For the further development of mediation, the *evaluation* of existing models is essential. There is a need for evaluative research on mediation in penal matters, in particular as it is still in its initial stages in most European countries. The present paragraph, therefore, encourages the promotion of such research.

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1. The term "offender" which is, for practical reasons, used throughout the Recommendation and the Explanatory Memorandum would also cover the alleged offender e.g. the accused or any person charged with a criminal offence.