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# THE WORK OF THE EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) CONCERNING MEDIATION AND IN PARTICULAR THE DEVELOPMENT OF GUIDELINES AIMING AT IMPROVING THE IMPLEMENTATION BETWEEN ADMINISTRATIVE AUTHORITIES AND PRIVATE PARTIES RECOMMENDATION Rec (2001)9

# INDEX



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## 1. Recommendations on Mediation adopted by the Committee of Ministers of the Council of Europe

The Committee of Ministers of the Council of Europe has adopted four Recommendations concerning Mediation:

- Recommendation Rec (98) in family mediation
- Recommendation Rec (99) on 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

The purpose of this paper is, focusing on **Rec (2001) 9**, to make some comments on its particular technical features related with its principles and concepts.
Subsequently, to inform about CEPEJ-WG-MED recent work on the guidelines aiming at improving its implementation.[1]

## 2. Recommendation Rec (2001) 9 on alternatives to litigation between administrative authorities and private parties

### 2.1. Explanatory memorandum [2]

This Recommendation deals with "alternative dispute resolution"[3] means, in general, not only mediation, differing, in this particular feature, from the above mentioned Recommendations on civil, penal and family matters in which only mediation is mentioned.
It was approved in 2000 by the Committee of Ministers based on a study made for international experts and on the replies given by the Council of Europe members and observer States to a questionnaire.
Its *Explanatory Memorandum* allows to clarify some important aspects, namely, the principles in which the Recommendation was based on and some of the incorporated concepts.

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[1] The author is not representing CEPEJ-GT-MED and she is the only responsible for this presentation
[2] Council of Europe Publishing – May 2002 - ISBN 92–871–4809-0
[3]The expression "ADR" being traditionally used to mention non-judicial means of resolving disputes is employed in this presentation for its simplicity and general knowledge, though at present most practitioners and researchers consider these means not as mere alternatives to courts but as distinct and adequate forms of settling disputes.

It identifies the "increasing problems observed in this area":

- Overburdening of the courts in general
- Inappropriateness of judicial proceedings to certain types of disputes

"The development of alternative means for settling disputes between administration and private parties is, according to the *Memorandum* due to situational and structural factors."

Regarding the former, these means are considered a "temporary expedient" until the courts are improved in countries where "the resources of courts are inadequate in both quantitative and qualitative terms", stating that while "proper courts do not exist, extrajudicial solutions can be applied."

Concerning structural factors "citizens are now more aware of their rights and what they can claim and traditional judicial procedures often no longer fulfil their need for justice."

According to our point of view, these considerations reveal an apparent misunderstanding of the main purposes of non-judicial resolution means, namely, mediation – they are not a minor method of resolving conflicts to substitute judiciary or when it is not efficient, but an answer to more demanding societies where, even when judiciary is available and efficient, citizens and administration, opt for a non-judicial procedure instead.

Anyway, we agree that, when available, it can be a valuable resource to resolve conflicts when the judicial system fails or even a contribute to the development of systems in transition when properly used, in regard of the principles of voluntarily, confidentiality and when the neutral is binding to an ethic code of conduct as a guarantee of its independence and neutrality.

According to the *Memorandum* the Recommendation is based in the following main principles:

- The use of courts while not always the most suitable way of resolving administrative disputes nonetheless remains necessary; alternative processes should not be a substitute for it but a complement to it.
- Using alternative means for resolving disputes, administrative authorities should respect the principle of legality and neither they, nor private parties, should view or use alternative means as a way of avoiding their obligations.
- Member states should ensure that the fundamental principles of equality, impartiality and the rights of the parties are upheld

and respect for these principles must be guaranteed through review by courts which constitutes the ultimate guarantee protecting the rights of the public and the administration alike.

Concerning these principles, we must conclude that "ADR" for the purpose of this Recommendation has a secondary role as the last word belongs to courts, except for arbitration.
We will return to this question later on.

## 2.2. Advantages

The Recommendation *Explanatory Notes* enunciate the advantages of the use of non-judiciary means to resolve disputes between public authorities and private parties, such as:

- Obtain a decision in reasonable time
- Bring administration closer to the public
- Speedy and less expensive resolution
- Flexibility
- Discreet and friendly nature of the procedure
- Equitable principles not just strict legal rules

## 2.3. The alternative means covered by the recommendation

The *Explanatory Memorandum* mentions the effort made so that the following list of alternative means was as exhaustive as possible, giving a definition of each one:

- **Internal review** – "an appeal procedure before a competent administrative authority which can be either the one which issued the contested act or a higher authority in the administrative hierarchy"
- **Conciliation** – "non-judicial procedure involving a third party to bring the parties to a mutually acceptable solution"
- **Mediation** – "non-judicial procedure involving a third party who proposes a solution to the dispute in the form of a non-binding opinion or recommendation"
- **Negotiated settlement** – "agreement resulting from any of the mentioned procedures or other"
- **Arbitration** – "a procedure under which the responsibility for settling a dispute outside the court system by a decision legally binding on the parties is entrusted to one or several persons specially nominated"

However, under our point of view, the list of alternative means covered by the Recommendation, not being, obviously, exhaustive, includes one means which under a technically point of view, should not be considered – "internal reviews".
"Primary" dispute resolution processes are adjudication, arbitration, mediation and negotiation.[4]
Adjudication is a judicial procedure, carried out by a judge, while arbitration, mediation and negotiation, being private (non-judicial) procedures, are considered, in that sense, as "alternatives" to courts.
Both parties participate, either by themselves or with the assistance of a neutral – mediator, conciliator or facilitator – to achieve an outcome.
Under this perspective "internal reviews" are not considered an "alternative dispute resolution".
The petitioner does not interfere in the decision, as it consists only in a mere re-examination, by a public entity, of a previous one in order either to change or keep it.
In this perspective, it can be, as public enquiries, consultation, negotiation or hearings a means of preventing disputes prior to the administration's acts.[5]
Besides, the definition of "conciliation" and "mediation" differs from the one generally established.
It is true that sometimes these terms can not be understood in the same way in the various member states of the Council of Europe and some of them do not make a distinction between the two.[6]
However, at present time the most generalized definition of "mediation" is the one given to "conciliation" in the present Recommendation.
In fact, mediators, as generally accepted by practitioners and researchers as well, are not supposed to propose solutions but only to help parties to get to the agreement, by themselves, according to their own interests at a stage of the procedure when they are able to abandon positions concerning the issues of disagreement and change its litigant behaviour into a cooperative attitude.

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[4] "*Dispute Resolution – Negotiation, mediation and other processes*", Goldberg, Sander, Rogers, Aspen Law and Business, 199, pág.4
[5] See the "Explanatory Memorandum", page 20
[6] See the "Explanatory Memorandum", page 18

The concept of conciliation is not so clear, but, basically it corresponds to the definition of mediation in this Recommendation.
Normally the expression "conciliation" is used sometimes for the "judicial conciliation" when the judge tries to conciliate parties before trial.
This procedure differs a lot from mediation.
The autonomy of "negotiated settlement" does not make much sense, as mediation and even conciliation are both "negotiated settlements".
The difference is that in these cases parties can reach a resolution directly either without the intervention of a third neutral or with the assistance of a facilitator.
The concept of "arbitration" is acceptable though it is not judicial, as the arbitrators are not judges but persons nominated by the parties, and, in consequence, it is a "private" not "public" means of solving disputes.

## 2.4. Relationship with courts

We do agree that some "alternative means", such as mediation, can be used prior to legal proceeding even as prerequisite to the commencement of it.
It is also possible, even desirable, that mediation could be used during the legal proceedings, following the initiative of the parties or suggestion of the judge.
However, the principles on II. iv and v of the Recommendation are highly restrictive of the use of ADR in public disputes.
In this sense the "alternatives" are always limited by the intervention of the judiciary, as an authority empowered to evaluate the legality and rights of users and administration after the agreement is settled in mediation, conciliation and negotiation.
In fact, under this perspective the agreement obtained in negotiation, conciliation or mediation will never be considered the final word as the parties have to submit it to the control of courts.
As far as we know, in most legal system, the administrative acts, even when they are illegal or offend citizen's rights, are only submitted to courts following the initiative of private parties.
In most cases, there are time-limits for bringing procedures before court.
So, even when the administrative act is illegal it turns into "legal form" when time-limits are exceeded.
Besides, if there is an "informal agreement" between public authorities and private parties, the control of legality does not exist.

Why should it be different if it was preceded by a procedure in which there is the intervention of a neutral, as it happens in mediation, conciliation and, sometimes, in negotiation?
As we know, the said "Alternative Dispute Resolution" aims to be an option to resolve conflicts in a private, confidential and in a faster way, when parties agree voluntary to it.
It is desirable that they could be used in order to avoiding courts, even a prerequisite before legal proceedings are started or when they are pending before courts.
Differently, in arbitration, the neutral – the arbitrator – chosen by the parties, decides the case and his decision has the same value as a judicial decision and excludes, as stated in II. iii., legal proceedings.
This distinction is not clear – why then in this case there is no need to judicial review?
In negotiation, conciliation or mediation if they take place during courts procedures, the judge ratifies the agreement, when or if the parties submit it to that purpose.
However, these means, being alternative should exclude, obviously, the intervention of courts for the purpose of the control of the rights of the public and administrative authorities.
On the other hand, if one of the purposes of this Recommendation is to contribute to reduce the excessive workload in the courts, the intervention of the judiciary will become an obstacle to it, and probably, to the right to a hearing within a reasonable time.
Besides it may disincentive parties to make a serious effort to settle their own disputes through non adversarial means.
In fact, according to the Recommendation, it is possible that the court may change the agreement based in "prevailing" legality criterions.
However, as we know, mediation is based in parties' interests not in legal solutions.
This rule applies to mediation when public authorities are involved as a part of the conflict – public interest, the interest of third parties, the rights and duties legally due have to be observed.
But this rule does not differ from mediation in other fields such as family in certain more sensitive features such as the best interest of the child or in mediation between victim and offender.
So, the intervention of courts, according to our point of view should be timely re-examined.

## 3. Third Summit of the Council of Europe (Warsaw May 2005)

The full use of the Council of Europe's standard-setting potential, the promotion of the implementation and further development of the Organization's legal instruments and mechanisms of legal co-operation, the need to help member States to deliver Justice fairly and rapidly and to develop alternative means to settle disputes were some of the decisions adopted by the Heads of State and Government at the Third Summit hold in Warsaw in May 2005.
In the light of these decisions was set up the Working Group on Mediation (CEPEJ-GT-MED) whose aim in its Statute was "to enable a better implementation of the international legal instruments of the Council of Europe instruments and standards regarding alternative dispute settlement concerning the above mentioned Recommendations.
Besides, it was charged with the mission of recommend specific measures for facilitating their effective implementation, thus improving implementation of the mediation principles contained in these Recommendations."

## 4. CEPEJ-WG-MED - The development of the guidelines aiming at improving the implementation of Rec(2001) 9

The CEPEJ-WG-MED was set up to gauge the impact in the member States of the four mentioned Recommendations and to recommend specific measures for facilitating their effective implementation.
A questionnaire was drawn up to determine member States awareness of the Recommendations.
This questionnaire, available in the internet so that anyone interested could answer it, was formally sent to 16 representative member States.
However, only Germany, Lithuania, Romania and United Kingdom answered the part concerning Recommendation (2001) 9.
By comparison, the available data concerning the use, by member States, of mediation in administrative cases mentions that in 2004, only Luxembourg and the Netherlands answered positively, the former with 953 cases and the second with 277 cases.[7]
However, it is clear that this Recommendation, comparing to the other three was the less known to most member States and "ADR" in

[7] European Judicial Systems, CEPEJ Studies nº1

this specific field – conflicts between public authorities and private parties – are not generally accepted.
Nevertheless it is recognized the importance of its principles concerning the measures facilitating access to justice and encouraging the use of non-adversarial means, as well as a safeguard for the rights of citizens and of the administration, in accordance with the European Convention of Human Rights.
Some obstacles were identified from the answers to the questionnaire:

- **Lack of awareness** – member States are unaware of the potential usefulness and effectiveness of alternatives to litigation between administrative authorities and private parties
- **Few efforts have been made to improve awareness of the advantages of these means** – simpler, prompter, less expensive, speedier, more equitable than litigation in courts, leading to decisively to more creative, efficient and sensible outcomes
- **Distrust of the courts to the development of non-judicial alternatives in the administrative**
- **Lack of awareness of various alternative disoute resolution means in this field**
- **Lack of specialized neutrals in this area**
- **Little academic research in this field**

According to these conclusions CEPEJ-WG-MED prepared the guidelines which will be presented to the CEPEJ.
They are divided into three headings:

- ✓ **AVAILIBILITY**
  - Adoption of adequate policies to encourage the use of ADR
  - Promotion and set up workable alternative schemes
  - Financial support
- ✓ **ACCESSIBILITY**
  - Free or reasonable costs for alternative means
  - Provisions for the suspension or limitation terms
- ✓ **AWARENESS**
  - Promotion of information for the general public, users, judiciary and lawyers

The emphasis of the guidelines lays on the need of involving not only Governments but all the stakeholders – judges, lawyers, public

authorities and users and public in general – in the development of the Recommendation.

## 4. CONCLUSIONS

We strongly advocate that the Recommendation Rec(2001)9 should be amended not only to clarify some misunderstanding of some concepts, but to give special importance to mediation and arbitration.
The relationship with courts should also be re-considered to improve it in order to award non-judicial means of resolving disputes more independence and importance.
Anyway, we do believe that amendments to the Recommendation should be based on the knowledge of member States experiences concerning its implementation which still will take a few years.