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European Commission for the Efficiency of Justice (CEPEJ)

Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties

Introduction

1. At the Third Summit of the Council of Europe (Warsaw, May 2005), the Heads of State and Government undertook to make “full use of the Council of Europe’s standard-setting potential” and “promote implementation and further development of the Organisation’s legal instruments and mechanisms of legal co-operation”. They also decided “to help member states to deliver justice fairly and rapidly and to develop alternative means for the settlement of disputes”.

2. In the light of these decisions, the CEPEJ, one of whose aims in its Statute is “to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice”, has included among its priorities a new activity directed towards facilitating effective implementation of Council of Europe instruments and standards regarding alternative dispute settlement.

3. The Working Group on Mediation (CEPEJ-GT-MED)¹ was therefore set up to gauge the impact in member States of the relevant recommendations of the Committee of Ministers, namely:

- Recommendation Rec(98)1 on family mediation,
- Recommendation Rec(2002)10 on mediation in civil matters,
- Recommendation Rec(99)19 concerning mediation in penal matters,
- Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties,

and to recommend specific measures for facilitating their effective implementation, thus improving implementation of the mediation principles contained in these recommendations.

4. This document concerns Recommendation Rec(2001)9 on alternatives to litigation between administrative authorities and private parties. The three other Recommendations concerning family mediation, mediation in civil matters and mediation in penal matters may require specific approach and are examined in separate documents.

5. At the first meeting of the Working Group (Strasbourg, 8-10 March 2006), a questionnaire was drawn up to determine member States’ awareness of the above Recommendations and the development of alternatives to litigation between administrative authorities and private parties in their countries in accordance with the principles contained therein. The questionnaires were sent to 16 representative States.

6. 52 replies were received to the questionnaire from member States and from practitioners and a report was drawn up by Mr Julien LHUILLIER (France), scientific expert, summarising those responses.

7. It is suggested that further work should be undertaken on updating the Recommendation and its explanatory memorandum, in particular concerning the concept and definitions of mediation and conciliation. Before doing so, it would be necessary to have a fuller evaluation of the impact of alternatives to litigation between administrative authorities and private parties in member states based on up-to-date and comparable data.

¹ The CEPEJ-GT-MED is composed as followed: Ms Nina BETETTO (Slovenia), Ms Ivana BORZOVÁ (Czech Republic), Mr Peter ESCHWEILER (Germany), Ms Maria da Conceição OLIVEIRA (Portugal), Mr Rimantas SIMAITIS – President - (Lithuania), Mr Jeremy TAGG (United Kingdom), Ms Anna WERGENS (Sweden).

8. As might be expected, there are considerable differences between member States in the way that alternatives to litigation between administrative authorities and private parties have advanced, particularly because of the following obstacles:

- member States are unaware of the potential usefulness and effectiveness of alternatives to litigation between administrative authorities and private parties;
- therefore few efforts have been made in order that administrative authorities are aware of the advantages of these means, which can lead to creative, efficient and sensible outcomes;
- distrust of the courts to the development of non-judicial alternatives to litigation in the administrative field;
- lack of awareness of various alternative dispute resolution means in this specific field;
- lack of specialized neutrals in this area;
- little academic research has been undertaken on alternatives to litigation in administrative field.

9. In the light of these obstacles, the Working Group has therefore drawn up the following non binding guidelines to help member states to implement the Recommendation on alternatives to litigation between administrative authorities and private parties..

1. AVAILABILITY

10. Alternatives to litigation between administrative authorities and private parties will only become established in member States if a policy that addresses the use of these means of dispute resolution is adopted, either to prevent disputes before they arise or to resolve them subsequently.

11. These means must be available and in, order to expand their availability, measures should be taken to promote and set up workable schemes.

1.1 Role of member States

12. Member States, namely Governments and administrative authorities, play a central role concerning the promotion of the use of alternative means for resolving disputes with private parties, concerning individual administrative acts, contracts, civil liability or other issues of controversy.

13. Member states are encouraged to define when and how it is appropriate to use such alternative means as internal review, conciliation, mediation, negotiated settlement and arbitration

14. Member States should adopt specific measures to promote the use of alternative means of dispute resolution either by their institutionalisation or their use case-by-case.

15. When necessary, they should adopt legislation or adapt the existing legislation according to the principles in the Recommendation, for example making internal reviews, conciliation, mediation and negotiated settlement compulsory in certain cases.

16. Member States should encourage the use of internal reviews, conciliation, mediation and negotiated settlement as a prerequisite to the commencement of legal procedures.

17. Member States should encourage administrative authorities to propose alternative means of dispute resolution when available and not against existing law to resolve issues in dispute with private parties.

18. Member States should encourage administrative authorities to review standard agreements for contracts, grants and other assistance to authorize and encourage the use of alternative means of dispute resolution.

19. When required by private parties, administrative authorities should accept to submit the issue in dispute to an alternative dispute resolution means available, unless this procedure is against public interest or is abused by a private individual.

1.2 Support of alternatives to litigation between administrative authorities and private parties projects by member States

20. States should recognise and promote alternatives to litigation between administrative authorities and private parties schemes, by financial support or other form of support, to ensure they provide a quality service and a balanced involvement of all concerned parties (officers or employees representing public authorities, private parties, recognized neutrals associations, researchers, bar associations, judiciary, legal professionals, etc)

21. Internal review, being an important means of preventing disputes before they arise, should be used before alternative dispute resolution procedures even when they are available.

1.3. Role of administrative authorities

22. Administrative authorities should, in their daily practice in relation to private parties, use internal review procedure for the expediency and/or legality of an administrative act.

23. Administrative authorities should use the most appropriate methods of alternative dispute resolution, with the agreement of the parties.

1.4. Role of the judge

24. Judges have an important role in the development of alternatives to litigation between administrative authorities and private parties. Where applicable, they should have the power to recommend alternatives to litigation, namely conciliation, mediation and negotiated settlement, and arrange information sessions. It is important therefore that these alternatives are available, either by the establishment of court annexed schemes or by directing parties to lists of neutrals.

25. In judicial review, judges must take into account parties' agreement unless it is against the public interest.

1.5. Role of lawyers

26. The codes of conduct for lawyers should include an obligation or a recommendation to consider alternative means of dispute resolution including alternatives to litigation between administrative authorities and private parties before going to court, in appropriate cases, and to give relevant information and advice to their clients.

27. Bar associations and lawyers associations should have lists of neutrals specialized in alternative means to litigation between administrative authorities and private parties and disseminate them to lawyers.

1.6. Quality of alternatives to litigation between administrative authorities and private parties schemes

28. It is important that schemes and on-going pilot projects are continually monitored and evaluated to ensure they respect the principles of equality and impartiality and the rights of parties. Certain common criteria of evaluation should be developed.

29. Member States should encourage public authorities to work together to facilitate, promote and coordinate the use of alternative dispute resolution between public authorities and private parties.

1.7 Neutrals' qualifications

30. It is essential for administrative authorities when proposing or accepting alternatives to litigation, for judges when referring parties to these means, for lawyers when advising clients, and for the general public's confidence that the quality of the services provided is ensured.

31. In order to ensure the principles of equality, impartiality and the rights of parties, neutrals - mediators, conciliators, negotiators and arbitrators - should not be permanent or temporary public officers or employees,

32. Taking into account the disparities in training programmes, member States should try to ensure that neutrals have adequate training programmes and should set up common standards concerning the training.

33. As a minimum, the following items should be covered in the training of neutrals:

- principles and aims of alternatives to litigation between administrative authorities and private parties,
- attitude and ethics of neutrals,
- characteristics, phases and aims of each means – mediation, conciliation, negotiated settlement and arbitration.
- indication, structure and course of the various alternatives to litigation between administrative authorities and private parties,
- legal framework of the various alternatives to litigation between administrative authorities and private parties,
- skills and techniques of communication and negotiation,
- skills and techniques of the various alternatives to litigation between administrative authorities and private parties,
- adequate amount of role plays and other practical exercises,
- peculiarities of alternatives to litigation between administrative authorities and private parties
- assessment of the knowledge and competences of the trainee.

34. This training should take into account the specific nature of mediators/conciliators, negotiators and arbitrators.

35. It is strongly recommended that this training should be followed by supervision, mentoring and continuing professional development.

36. Member States should recognise the importance of establishing common criteria to permit the accreditation of neutrals and/or institutions which provide alternatives to litigation between administrative authorities and private parties and/or who train neutrals. Because of the increased mobility throughout Europe, measures should be taken to establish common international criteria for accreditation as, for example, a certificate of European mediator, etc.

37. As certain member States encounter problems where the quality of training of neutrals is concerned, national training institutions are recommended to establish links and/or to establish a continuous training programme for neutrals (for example, a European neutrals training centre). This could be facilitated by the Council of Europe in co-operation with the European Union.

1.8. Codes of conduct

38. Member States should take measures to ensure the uniformity in the concepts, scope and guarantees of the main principles of alternatives to litigation between administrative authorities and private parties such as confidentiality, when applicable, and others within their countries.

39. Having in mind that the European Code of Conduct for Mediators in civil and commercial mediation is gaining general recognition by various mediation stakeholders throughout Europe, it is recommended that special codes are developed for alternatives to litigation between administrative authorities and private parties.

1.9. Breaches of codes of conduct

40. Where neutrals breach a code of conduct, member states should have in place appropriate complaints and disciplinary procedures.

2. ACCESSIBILITY

2.1. Cost of the alternatives to litigation between administrative authorities and private parties for the users

41. Internal review, being normally the “first level” of solving disputes, should be free to encourage both parties to reach a consensual solution for the case without the intervention of a neutral or the courts.

42. Concerning other means, where the intervention of a neutral is necessary, the cost for the private parties should be reasonable and proportionate to the issue at stake. In order to make alternatives to litigation between administrative authorities and private parties accessible for the general public, member States should ensure some direct financial support to them. For reason of equality before the law and access to law, it is unacceptable for some categories of the population to be excluded from a service on financial grounds. For those with limited financial means, member States should be encouraged to make legal aid available for parties involved in the alternatives to litigation between administrative authorities and private parties in the same way that it would provide for legal aid in litigation.

2.2. Suspension of limitation terms

43. Parties should not be prevented from using alternatives to courts, except for arbitration, by the expiry of limitation terms.

44. Member States are encouraged to implement provisions for the suspension of limitation terms.

3. AWARENESS

45. It appears from the questionnaire responses that lack of awareness among member states, governments and administrative authorities, the judiciary, legal professionals, users of the justice system and the general public is one of the main obstacles to the development of the alternatives to litigation between administrative authorities and private parties.

46. In order for the Recommendation on alternatives to litigation between administrative authorities and private parties to be accessible to policy makers, public officers and employees, academics, private parties stakeholders and neutrals, it is vital that it is translated and disseminated in the languages of all member States.

47. It is recommended that CEPEJ creates a special page on mediation and other alternatives to litigation in its website. It could include translated text of the Recommendations, their explanatory memorandum and other relevant texts of the Council of Europe, assessment of the impact in countries of the Recommendations concerned. This special page could also include information on the monitoring and evaluation of mediation and other alternatives to litigation schemes and pilot projects, list of mediation providers or neutrals in member states, useful website links, etc.

3.1. Awareness of general public

48. Member States, Government's officers or employees and neutrals should take appropriate measures to raise awareness of the benefits of the alternatives to litigation between administrative authorities and private parties among the general public.

49. Such measures may include:

- Articles/information in the media,
- dissemination of information on alternatives to litigation via leaflets/booklets, internet, posters,
- neutrals telephone helpline,
- information and advice centres,
- focused awareness programmes,
- seminars and conferences,
- open days at courts and institutions which provide these services

50. Member States are also encouraged to make information available to the general public on how to access and use alternatives to litigation between administrative authorities and private parties, in particular on the internet.

51. Member States should also note that court annexed alternatives to litigation between administrative authorities and private parties in practice appear to be an efficient means of raising awareness for the judiciary, legal professionals and users.

52. Member States, universities, other academic institutions and alternatives to litigation between administrative authorities and private parties stakeholders should support and promote scientific research in the field of these alternatives to litigation.

53. These alternatives to litigation should be included in schools national curricula.

3.2. Awareness of the users

54. Government officials and employees, members of the judiciary, prosecutors, lawyers and other legal professionals as well as other institutions involved in dispute resolution should provide information and advice on alternatives to litigation between administrative authorities and private parties.

55. In order to make these alternatives to litigation more attractive to users, member States may wish to consider diminishing, abolishing or reimbursing court fees in specific cases if alternatives to litigation are used to try to settle the dispute either before going to court or during court proceedings.

56. Member States may request from the private parties and from the providers of legal aid, before receiving legal aid for the litigation, to consider amicable settlements of the dispute, including these alternatives to litigation.

3.3. Awareness of the judiciary

57. Where judges play a role in alternatives to litigation between administrative authorities and private parties, it is essential that they have a full knowledge and understanding of the processes and their benefits. This may be achieved through information sessions as well as initial and in-service training programmes which include specific elements of these alternatives to litigation useful in day-to-day work of courts in particular jurisdictions.

58. It is important to foster both institutional and individual links between judges and neutrals. This can be done in particular by joint conferences and seminars.

3.4. Awareness of the lawyers

59. Alternatives to litigation between administrative authorities and private parties should be included in the curricula of initial as well as continuous training programmes for lawyers.

60. Members States and Bar associations should take measures to create legal fee structures that do not discourage lawyers from advising clients to use amicable dispute resolution methods. For example, fixed fees for specific cases could encourage early settlements, clients could pay the same fees to lawyers irrespective of whether a specific case is resolved by alternatives to litigation or through the traditional court process, higher rate of fees for lawyers may be payable if the settlement is achieved.