COMMISSION OF THE EUROPEAN COMMUNITIES

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS

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A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

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The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

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MEDIATION IN CIVIL AND COMMERCIAL MATTERS

Executive Summary

- While APIL supports the further promotion of mediation in Europe, we firmly believe that it is essential that the process is consensual and not obligatory.

- In terms of the use of mediation for personal injury claims, APIL believes that it is an essential part of every personal injury practitioner's 'toolkit' and should be conducted by trained mediators with experience in personal injury litigation.

- APIL envisages that one of difficulties with the European Commission's proposals concerning mediation is the low-level of such services which currently exist in Europe.

- APIL considers that the most effective way of promoting mediation, taking into account the issue of subsidiarity, is via the proposed directive.

- APIL sees no reason why mediation should be used in cross-border cases only.

- If the European Commission wants mediation to be used more widely, APIL proposes that appropriate funding needs to be provided in order to support such an initiative. This funding would allow more alternate dispute resolution (ADR) facilities and services to be established in countries with currently low levels of mediation.

- APIL does not, in principle, have any objections to the definition of 'mediation' as contained within the directive. In terms of the definition of 'mediator', APIL suggests that there should be a stipulation concerning the required level of competency – both as a mediator and within their

specialist area of law – which a person must have in order to be accredited as a mediator.

- APIL believes that a Tomlin order would be effective enforcement mechanism, at least within the UK jurisdiction, for settlement decisions.

- APIL is supportive of the suggestion that the *"period of prescription or limitation regarding the claim that is the subject matter of the mediation shall be suspended … after the dispute has arisen"*[1] as the current limitation rules governing personal injuries in the UK are overly restrictive and can lead to instances of injustice.

[1] Directive – Article 7 – page 12 – paragraph 1

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Commission of the European Communities consultation on certain aspects of mediation in civil and commercial matters. Please note, however, that as APIL represents the civil justice interests of people injured through the negligence of others, our response will primarily concentrate on the use of mediation for resolving personal injury claims.

Consultation Questions

Is the proposal for a directive necessary and justified in the light of the principle of subsidiarity and, if so, why? What would be its concrete benefits?

2. APIL supports the objective of the directive and believes that it will *"facilitate access to dispute resolution by promoting the use of mediation and* [ensure] *a sound relationship between mediation and judicial proceedings"*. In terms of the principle of subsidiarity[2], APIL believes the real benefit of the directive would be in relation to those EU countries which currently have under-developed mediation facilities and services. The directive would therefore promote and encourage mediation in these countries. In contrast, under the same principle, the directive will have a limited impact on the United Kingdom (UK) as it has relevantly well-developed mediation services, mostly for commercial matters.

3. While APIL supports the further promotion of mediation in Europe, we firmly believe that it is essential that the process is consensual and

[2] Essentially what the lesser entity (in this case, the member country) can do adequately should not be done by the greater entity (the European Union) unless it can do it better. *"The principle of subsidiarity regulates the exercise of powers. It is intended to determine whether, in an area where there is joint competence, the Union can take action or should leave the matter to the Member States."* EU Commission website – Europa – EU Decision-making procedures – The subsidiarity principle and the role of national parliaments (See http://europa.eu.int/scadplus/european_convention/subsidiarity_en.htm for further details)

not obligatory. We are therefore pleased to see that Article 3 of the directive supports the non-compulsory use of mediation by stating that a court *"may, where appropriate and having regard to all circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may in any event require the parties to attend an information session on the use of mediation"*[3]. APIL is concerned, however, by the implication within paragraph 2 that the directive would not prevent *"national legislation making the use of mediation compulsory or subject to … sanctions".* APIL feels that mediation should always be a consensual process and by making it compulsory many of the benefits of it may be lost.

4. APIL accepts that under the current UK pre-action protocol for the resolution of clinical disputes there is a duty to *"consider the full range of options available following an adverse outcome with which a patient is dissatisfied, including … other appropriate dispute resolution methods (including mediation)"*[4]. It is important to note that this duty is only in relation to considering mediation, it does not impose a compulsory duty to engage in mediation. In fact the vast majority of clinical negligence cases are settled via roundtable discussions between the parties. In this sense, many features of mediation are already present in the current UK personal injury litigation system – for example the lack of an adversarial court room setting and settlement by mutual agreement. APIL is therefore concerned that the drive towards mediation might undermine such discussions, particularly if mediation is forced onto the parties.

5. In terms of the use of mediation for personal injury claims, APIL believes that it is an essential part of every personal injury practitioner's 'toolkit', and can work very well in cases in which there is an ongoing relationship to salvage (such as an employers' liability claim), where more is required by the injured person than monetary

[3] Directive – Article 3 – Referral to mediation – paragraph 1

compensation (an apology, for example) or where negotiations have broken down or stalled. Where mediation is seen by all parties to be a reasonable option, it is essential that the process is conducted by trained mediators with experience in personal injury litigation and, as already mentioned, under no circumstances should it be forced upon unwilling parties by the courts. APIL therefore welcomes the proposed directive as it will highlight alternate methods of resolving a claim. As long as the eventual resolution leaves the injured person with full and just compensation, APIL would fully endorse any mechanism which could make this process easier or less stressful.

6. APIL envisages that one of difficulties with the European Commission's proposals concerning mediation is the current level of such services which currently exist in Europe. As already mentioned, the UK will have little difficulty in meeting the requirements of the directive due to its current well-established and thriving mediation services, particularly in the area of commercial disputes. In contrast, however, APIL would anticipate that the UK's level of expertise and mediation facilities is not reflected across Europe. While the directive promotes mediation, this promotion may be fruitless due to the lack of facilities via which mediation can take place. APIL proposes that funding should be supplied by either the EU or the individual member state, or a combination of both, in order to build and establish mediation services. With these services in place, the promotion of mediation will be more effective and potentially wide-ranging in its effects.

[4] Pre-Action Protocol for the Resolution of Clinical Disputes – section 3: The Protocol – paragraph 3.5 (see http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm#prot-4 for a full copy of the document).

Would you prefer more attention to be given to encouraging codes of conduct and additions to or improvement of the existing Commission communications?

7. APIL considers that the most effective way of promoting mediation, taking into account the issue of subsidiarity, is via the proposed directive. We are less concerned about the method of delivery and promotion than with how mediation is going to be structured and monitored. For instance, we believe that mediation should be consensual and conducted by trained mediators. APIL sees no reason why more attention shouldn't be given to *"encouraging codes of conduct and additions to or improvement of the existing Commission communications"* as a means of promoting mediation in parallel to the proposals in the directive. We are supportive of the directive's intention, whether by the courts suggesting mediation or by organisation's code of conduct specifying it.

8. APIL also feels that if the European Commission is attempting to promote mediation it is only sensible that it does so in relation to its internal processes as well as promoting it outside the organisation.

Should the scope of the directive be limited to cross-border cases? What experience do you have of cross-border cases and what types of disputes are concerned? What is the monetary value of the average dispute?

9. APIL sees no reason why mediation should be used in cross-border cases only. If mediation is to be effectively encouraged, and the use of it widened, then it needs to be promoted in respect of all types of legal cases across all the jurisdictions. If mediation is restricted to cross-border cases only, its wider introduction into the jurisdictions of the EU will ultimately be piecemeal and its positive effect diffused.

10. In terms of the monetary value of the average dispute, APIL suggests that mediation can be used in all types of cases regardless of the

amount of money involved. For instance, within personal injury cases, the issues which need to be resolved may extend beyond the simple awarding of damages. Mediation in these cases will allow for the providing of an apology and/or an explanation, both of which can be hugely important to injured claimants. APIL is concerned, however, by the suggestion in the Explanatory Memorandum of the directive that the advantages of mediation are that it is *"a quicker, simpler and more cost-efficient way to solve disputes"*[5]. While mediation has many benefits, the cost effective nature of it is doubtful, as there is likely to be little difference between its cost and that of pursuing the case through litigation. In terms of small value cases, the cost of mediation may actually be more expensive than litigation. APIL feels that mediation needs to be promoted on its own benefits rather than as an attempt to reduce the cost of traditional litigation.

11. If the European Commission wants mediation to be used more widely, APIL proposes that appropriate funding needs to be provided in order to support such an initiative. This funding could then be used to create more alternate dispute resolution (ADR) facilities and services. For example, the Employment Tribunal is funded effectively by the Government, and offers a system where disputes between employer and employee can be resolved. The effective funding of mediation may allow a similar scheme to be available for other types of disputes, including personal injury.

Are the definitions of "mediation" / "mediator" satisfactory? If not, why not?

12. APIL does not, in principle, have any objections to the definition of 'mediation' as contained within the directive. Irrespective of this definition, we consider that the concept of mediation and what it entails is adequately defined within the British legal system. In contrast APIL suspects that other EU jurisdictions either do not have

[5] Directive – Explanatory Memorandum – page 3 – paragraph 1.1.3

a definition of mediation or are less prescriptive in their understanding of mediation. In these instances the directive's definition is likely to facilitate the promotion and use of mediation.

13. In terms of the definition of 'mediator', APIL suggests that there should be a stipulation concerning the required level of competency which a person must have in order to be considered a mediator. This stipulation would lead to the directive being more readily accepted by the current leaders in the mediation field, such as the Netherlands and the UK. It would also reflect the European Commission's own intention as evidenced by Article 4 in the directive which details measures to ensure the *"quality of mediation"*[6].

14. APIL feels that the best way of achieving this level of quality is to ensure that the mediators are properly qualified, not only as mediators but also within their specialist areas of law. For instance, a commercial mediator is unlikely to fully understand the needs of both parties within personal injury mediation. To achieve such a standard there needs to be an emphasis on professional standards and training in order to qualify you as a mediator. While the notes to the directive talk about the *"development of a European code of conduct addressing key aspects of the mediation process"*[7], APIL believes that the qualifying process should be placed on more transparent footing, namely externally validated accreditation. This will ensure that the quality of mediators is consistent, and it will also allow the standard of mediation to be monitored and appropriate action taken if necessary – i.e. the possible removal of accreditation, therefore disqualifying you as a mediator. In addition, APIL considers that it would be worthwhile for the EU to consult leading dispute resolution providers in order to develop a definition which will adequately capture the unique skills needed as a mediator.

[6] Directive – Article 4 title
[7] Directive – page 8 – paragraph 13

15. APIL believes that the benefit of having a specialist mediator is that he will act as a facilitator for the whole process. For instance, due to the fact the mediator is an expert in that particular area of law he can indicate to each party, in complete confidence, the strengths and weaknesses of their respective cases. By doing this, the client may be more willing to take advice because he is hearing it from a third party. In addition, in personal injury cases, the injured claimant is often looking for more than just compensation, such as an apology and/or explanation. Commercial mediators may not be sensitive to these needs.

16. In terms of specialist personal injury accreditation, APIL has recently introduced such a scheme for its members. This means that APIL members now have to complete a certain amount of compulsory training in order to retain both their membership as well as their accreditation[8]. This accreditation means that APIL accredited members have up to date legal knowledge and are experienced personal injury lawyers. We therefore suggest that any type of personal injury mediator accreditation recommended by the EU as part of the mediation initiative should reflect the high standards required within APIL's scheme.

Do you see any difficulties with the provision on enforcement of settlement decisions? If so, please specify.

17. APIL suggests that there are various elements within mediation which are not capable of being placed into a *"judgment* [or] *decision"*[9]*.* We therefore suspect the inclusion of this stipulation reflects more commercial aspects of mediation – which will often involve complex monetary agreements – rather than civil mediation. For instance, in terms of personal injury, an aspect of mediation which would not be easily included in a judgment or decision would be the need for an

[8] Please see http://www.apil.com/levels-of-accreditation.php for further details of APIL's Accreditation scheme.
[9] Directive – Article 5 – page 10 – paragraph 1

apology or explanation. These elements could, however, be part of a Schedule attached to a Tomlin Order[10]. A Tomlin Order is an agreement between two parties committing them to certain actions or payments, or both, which are set-down in a schedule on the understanding that the case is halted or suspended.

18. APIL accordingly believes that a Tomlin order would be effective enforcement mechanism, at least within the UK jurisdiction, for settlement decisions. It would also place mediation settlements on an equal footing with judicial decisions in terms of enforceability. The primary reason for mediation is in order for the parties to come to a consensus about their preferred solution to the claim. APIL would therefore think it unlikely that one party will either renege on the meditation agreement or resort to the courts in order to enforce such an agreement. In the instances where this does occur, however, APIL recommends that a Tomlin order could be used to specify – via a schedule – what is expected of each party. In terms of the judicial enforceability of a Tomlin Order, a recent decision relating to a commercial matter found that *"the Tomlin order drafted at the end of the mediation was an unconditional and enforceable contract binding on the administrators of the company"*[11].

19. APIL proposes that in instances of non-adherence to a Tomlin order, there should be a fast-track procedure whereby the matter goes in front of a court and an order of court is made to satisfy the mediation settlement. This will prevent people engaging in mediation simply as a means of strategic manoeuvring.

[10] A Tomlin Order is traditionally "[a]*n order which records that an action is stayed by the agreement of the parties on terms set out in a schedule".* Osborn's Concise Law Dictionary (7th edition) Sweet & Maxwell (London) -1983

[11] Thakrar v Ciro Citterio Menswear plc (1 October 2002) as summarised in *'A mediation setback? Don't speak too soon!'* Tony Allen (CEDR Director) - Legal Week (17th October 2002).

Do you see any difficulties with the provision on admissibility of evidence? If so, please specify.

20. APIL fully supports the stipulation in the directive that testimony and evidence resulting from the mediation process should be excluded in relation to any other type of legal proceedings. In order for mediation to succeed it has to be conducted in an atmosphere of consensus and confidentiality. It is therefore essential that mediation proceedings are conducted 'without prejudice'. APIL feels that it is the ability of both parties to speak freely, without threat of their comments appearing in subsequent legal proceedings.

21. APIL does acknowledge, however, that there may be occasions where mediation is used strategically by some parties. We believe such instances are likely to be few as mediation should not commence without the consent of both sides. With neither side being forced to engage in the process, it is hoped that this consensual approach will result in a decision that is mutually beneficial to both parties.

Do you see any difficulties with the provision on suspension of limitation periods? If so, please specify.

22. APIL is supportive of the suggestion that the *"period of prescription or limitation regarding the claim that is the subject matter of the mediation shall be suspended … after the dispute has arisen"*[12]. APIL agrees with this stipulation due to the current restrictive rules of limitation with which personal injury claimants are bound under in the UK. At the moment the limitation period for personal injury cases is only three years. Admittedly there is some court discretion concerning when this period has ended, but even so this leaves very little time for an injured person to instigate a compensation claim.

23. APIL would suggest that the suspension of the limitation period is hugely important if mediation is to be extended and promoted Europe-wide. Without the suspension of the limitation period, lawyers will be under an obligation – so as to avoid accusations of professional negligence – to issue court proceedings to ensure that their client's case can be heard and considered. In addition, the lack of limitation period suspension could result in defendants using mediation as a means to shorten the time a person has to bring a case, effectively destroying their chance of litigating.

24. APIL suggests that in order for mediation to be considered a viable alternative to litigation, it needs to include various safeguards. One such safeguard is the use of a Tomlin order to induce court enforcement of a mediation settlement, while the other is the suspension of the limitation period once mediation has started.

[12] Directive – Article 7 – page 12 – paragraph 1