

## EXECUTIVE NOTE

### THE CROSS-BORDER MEDIATION (SCOTLAND) REGULATIONS 2011

SSI 2011/234

1. The Cross-Border Mediation (Scotland) Regulations 2011 will, if approved, be made by the Scottish Ministers in exercise of the powers conferred on them by section 2(2) of the European Communities Act 1972 as amended. The instrument is subject to the affirmative resolution procedure in accordance with paragraph 2(2) of Schedule 2 to that Act.

#### Policy Objectives

##### *Background*

2. The Regulations make provision to implement Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (“the Directive”).

3. The Directive requires Member States to make provision by 21 May 2011 about certain identified fundamentals of mediation, so as to promote the use of mediation as a means of resolving cross-border disputes. Cross-border disputes are disputes where at least one of the parties is domiciled or habitually resident in a different Member State to that of any other party or parties, at the time when mediation is agreed. The Regulations therefore apply to disputes across EU Member State borders and do not apply to disputes across national borders within the UK. The Directive only covers disputes which relate to civil and commercial matters and deals solely with mediation, not with other forms of dispute resolution.

4. There are six primary requirements imposed on Member States by the Directive. These are as follows:

- **Mediation/mediator quality and awareness:** by a) encouraging mediators to operate under published voluntary codes of conduct, and b) encouraging training of mediators (**Article 4**).
- **Recourse to mediation:** by ensuring that it is possible for a court to invite parties to use mediation in order to settle the dispute and for the court to invite the parties to attend an information session on the use of mediation, if such sessions are held and easily available (**Article 5**).
- **Enforceability of mediated settlements:** by ensuring that written agreements negotiated through mediation are capable of being made enforceable if all the parties involved agree to this being done (**Article 6**).
- **Mediation confidentiality:** by protecting mediators and mediation provider organisations from being compelled to give evidence in civil proceedings, subject to specified exceptions (**Article 7**).

- **Prevention of the expiry of limitation or prescription periods during mediation:** by ensuring that no party can be prevented from initiating proceedings because a limitation or prescription period expired during the mediation process (**Article 8**).
- **Information for the general public:** by encouraging the availability, particularly on the internet, of information on how to contact mediators and organisations providing mediation services (**Article 9**).

5. The Regulations are part of wider action which implements the Directive:

- Scotland already meets the requirements of Articles 4, 5, 6 and 9. The Scottish Government has consulted with the Court of Session and Sheriff Court Rules Councils, the Registers of Scotland and others (for example colleagues dealing with family law).

- With regard to Article 4, the Scottish Government funded the setting up of the Scottish Mediation Register (SMR) to provide a quality assurance framework and continues to have a representative on the SMR Board. The aim of the SMR is to encourage minimum standards for Mediators in the areas of training, CPD, Codes of Conduct, complaints handling processes and indemnity Insurance. Only those mediators who meet the minimum standards of the SMR can use the SMR logo. The Register is available to members of the Public looking for a mediator.

- With regard to Article 5, there is no bar to parties being able to mediate in Scotland and judges and sheriffs may already invite parties to consider mediation in all appropriate civil cases.

- With regard to Article 6, it is already possible in Scotland to ensure that written settlements negotiated through mediation are capable of being made enforceable – if the parties involved agree to this being done. It is possible to register a mediation agreement for execution in the Books of Council and Session, which are held by the Keeper of the Registers of Scotland or in Sheriff Court Books. Equally the Court of Session or a Sheriff Court can be asked to interpose its authority to a minute of agreement. Both approaches could give the agreement similar force as a court decree.

- With regard to Article 9, the Scottish Mediation Register allows members of the public to search for a mediator in a specific area of work, in the geographical location of their choice and to see whether the mediator or mediation organisation meets minimum standards in the areas of training, etc.

### *The Regulations*

6. The Regulations ensure that Scotland meets the requirements of the Directive. They implement Article 7, which relates to the confidentiality of mediation, and Article 8 which relates to the expiry of limitation or prescription periods during the mediation process. The Regulations will come into force on 6 April 2011. Most of the Regulations consist of amendments to primary legislation in order to implement Article 8.

7. Regulation 3 implements Article 7 by providing that a mediator or person involved in the administration of mediation in relation to a cross-border dispute to which the Directive applies cannot be compelled to give evidence or produce anything about the mediation in civil proceedings or arbitration. The provision does not apply to the parties to the mediation. Nor will it apply if:

- the parties agree to disapply it;
- it is necessary for a mediator or mediation administrator to give evidence for overriding considerations of public policy (e.g. for child protection purposes as envisaged by Article 7.1(a) of the Directive); or
- It is necessary to disclose the content of a mediation agreement in order to implement or enforce the agreement.

8. Regulations 4 to 9 implement Article 8 by amending prescription and limitation periods in primary legislation. Their effect is to ensure that if a prescription or limitation period would otherwise have expired during mediation about a dispute covered by the Directive or within 8 weeks after the end of mediation, the period will be extended until 8 weeks after the end of the mediation. In order to achieve this, the provisions define when a mediation begins and ends.

9. Consideration was given to a number of options in implementing Article 8:

- Stopping any prescription or limitation periods entirely whenever a mediation started.
- To “freeze” such periods so that they did not run at all during the mediation but would start again where they left off once the mediation ended.
- Permitting a specified period after the end of the mediation if the prescription or limitation period would otherwise have expired during the mediation.

10. It was concluded that either of the first two methods could lead to delay and delaying tactics. In addition, in the first option the five-year period for negative prescription would have to start all over again from the point when the mediation was deemed to have ended. In the second option it would mean in effect that in all cross-border cases where mediation is attempted the prescription/limitation period would need to be extended. This is not the policy intention of the Directive. Article 8 is intended only to allow those approaching a time limit for claiming the chance to attempt to mediate first without feeling forced to lodge a claim in court due to that time limit.

11. The 8-week period was deemed to be sufficient time to still allow a claim to be made in court if the time limit had already expired. It was also further concluded that in order to meet the policy aims of the Directive similar provision should also be made for mediations which fail to settle a dispute close to the expiry of a time limit.

12. Accordingly the Regulations have been drafted to ensure that an 8-week period will be permitted after the end of the mediation if the prescription or limitation period would otherwise have expired during the mediation **or** within 8 weeks after the end of mediation

13. Regulations 4 to 6 amend general prescription and limitation periods in the Prescription and Limitation (Scotland) Act 1973. The amendments will only apply to cross-border disputes which will be covered by the Directive (those which relate to civil and commercial matters).

14. Regulations 7 to 9 amend periods in section 71 of the Civic Government (Scotland) Act 1982, section 37 of the Rent (Scotland) Act 1984 and sections 28 and 29 of the Family Law (Scotland) Act 2006. Cross-border disputes arising under these provisions are considered to be “civil or commercial” within the meaning of the Directive.

### **Consultation**

15. Although no formal consultation was carried out, there has been regular contact with stakeholders in the mediation community about the Directive. The Directive has been broadly welcomed by the mediation community and the risk of any difficulties in implementing this Directive is negligible.

### **Financial Effects**

16. In terms of preparing a Business and Regulatory Impact Assessment (BRIA), it is considered that the Regulations will have a negligible impact on business. The Regulations are permissive and do not force anyone engaged in cross-border civil or commercial activity to use mediation. The Regulations merely facilitate the use of mediation and, for example, in the case of amendments in relation to prescription and limitation, ensure that no one is penalised by using mediation. The Minister for Community Safety confirms that no BRIA is necessary.

Scottish Government  
Justice Directorate  
1 February 2011

**TRANSPOSITION NOTE**

**DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 21 MAY 2008 ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL MATTERS**

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 1	<p>1. The objective of the Directive is to facilitate access to ADR and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a 'balanced relationship' between mediation and judicial proceedings.</p> <p>2. The Directive shall apply in cross-border disputes, to civil and commercial matters except those rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend in particular to revenue, customs, or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (known as <i>acta iure imperii</i>).</p> <p>3. In this Directive, the term 'Member State' shall mean all Member States with the exception of Denmark.</p>	<p>Mediation is readily available in Scotland. There is no bar to parties being able to mediate in all appropriate cases and it is open to all parties who wish to use it. Court cases can be temporarily suspended ("sisted") at the request of the parties while mediation is attempted</p>	<p>1. The existing provision for mediation in Scotland is compatible with the general objective of the Directive and will be enhanced by the provisions detailed below in line with that objective.</p> <p>2. The Cross-Border Mediation (Scotland) Regulations 2011 transpose Articles 7 and 8 of the Directive. Regulations 3 to 6 make provision which will apply only to disputes to which the Directive applies.</p> <p>Regulations 7 to 9 amend statutes which apply to specific kinds of disputes, which are considered to be civil or commercial for the purposes of the Directive</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
Article 2	<p>1. For the purposes of this Directive a cross-border dispute shall be one in which <u>at least one</u> of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date of which:</p> <p>(a) The parties agree to use mediation after the dispute has arisen;</p> <p>(b) Mediation is ordered by the court;</p> <p>(c) An obligation to use mediation arises under national law; or</p> <p>(d) For the purposes of article 5 (below), an invitation is made to the parties.</p> <p>2 Notwithstanding paragraph 1, for the purposes of Articles 7 and 8, a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to paragraph 1(a), (b) or (c).</p> <p>3 For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No. 44/2001.</p>		<p>3. Not transposed</p> <p>The Cross-Border Mediation (Scotland) Regulations 2011 will apply to cross-border disputes as defined in Article 2.</p> <p>See regulation 2 (which applies definitions for the purpose of regulation 3) and regulations 5 to 9 (which insert definitions of “relevant cross-border dispute” into other statutes)</p>

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Article 3	<p>For the purpose of this Directive the following definitions shall apply:</p> <p>(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.</p> <p>It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the court of judicial proceedings concerning the dispute in question.</p> <p>(b) 'Mediator' means any third party who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.</p>		<p>The Cross-Border Mediation (Scotland) Regulations 2011 apply the definitions of "mediation" and "mediator" from the Directive.</p> <p>Regulation 2 applies definitions of "mediation" and "mediator" for the purpose of regulation 3 and regulations 5 to 9 insert definitions into other statutes.</p>

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Article 4	<p>1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.</p> <p>2. Member State shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial, and competent way in relation to the parties.</p>	<p>In general, the profession is self-regulating, having several membership/accreditation organisations.</p> <p>The Scottish Government carries out activities to encourage the development of quality control mechanisms and training for mediators. These include funding and assisting in the setting up of the Scottish Mediation Register with the aim of encouraging effective quality control assurance regarding mediators and mediation services. Individuals and Organisations can only become SMR registered members if they meet minimum standards in the areas of training, initial mentoring, CPD, Codes of Conduct, complaints handling processes and indemnity insurance. Members of the public are therefore able to identify which mediators meet these standards and which might not.</p>	<p><u>Administrative implementation as detailed in comments section.</u></p>
Article 5	<p>1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.</p> <p>2. The Directive is without prejudice to national legislation making the use of</p>	<p>The civil courts in Scotland (the Court of Session and sheriff courts) already have power to invite parties to consider using mediation in order to settle a dispute in operating under the Rules of the Court of Session 1994 as amended and the procedural rules which apply in the Sheriff Court.</p>	<p><u>Not transposed in the Cross-Border Mediation (Scotland) Regulations 2011. Courts already have the powers required by Article 5.</u></p>

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	<p>mediation compulsory or subject to incentives or sanctions whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.</p>	<p>There is explicit provision for referral to mediation in certain cases. This includes referral to mediation in family actions (under rules 33.22 and 33A.22 of the Sheriff Court Ordinary Cause Rules and under rule 49.23 in the Rules of the Court of Session).</p> <p>In addition in divorce and civil partnership dissolution cases where there is a reasonable prospect of reconciliation, the court must continue the case to allow attempts to effect such a reconciliation (see section 2 of the Divorce (Scotland) Act 1976 and section 118 of the Civil Partnership Act 2004). Such attempts at reconciliation could be made through mediation.</p>	
Article 6	<p>1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made of the law of that Member State does not provide for its enforceability.</p> <p>2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in</p>	<p>Written settlements negotiated through mediation are capable of being made enforceable, either through the courts or in an authentic instrument.</p> <p>Where a mediation agreement is self-proving in terms of the Requirements of Writing (Scotland) Act 1995, it may be registered for execution in the Books of Council and Session, which are held by the Keeper of the Registers of Scotland or in Sheriff Court Books. This will make the agreement an authentic instrument, in the sense that an extract of the document can then be issued and relied on as a basis for diligence (the process for civil debt recovery) without further recourse to a court.</p> <p>Alternatively, the Court of Session or a Sheriff Court can be asked to interpose its authority to a minute of agreement, setting out the terms of the mediation</p>	<p>Article 6.1, 6.2 and 6.4 not transposed in the Cross-Border Mediation (Scotland) Regulations 2011. <u>Mediation agreements can already be made enforceable as set out in comments section.</u></p> <p>Article 6.3 was implemented by providing information to the Commission via UK government officials.</p>

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	<p>accordance with the law of the Member State where the request is made.</p> <p>3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with the above parts of article 6.</p> <p>4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.</p>	<p>agreement.</p> <p>Both approaches give the agreement similar force to a court decree.</p>	
Article 7	<p>1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process except:</p> <p>(a) Where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to</p>	<p>While this reflects current practice, and confidentiality is generally reflected in agreements to mediate that are signed before a mediation takes place, confidentiality of mediation is not currently guaranteed by any legislation.</p>	Regulation 3 of the Cross-Border Mediation (Scotland) Regulations 2011

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	<p>prevent harm to the physical or psychological integrity of a person; or</p> <p>(b) Where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.</p> <p>2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.</p>		
Article 8	<p>1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.</p> <p>2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.</p>		Regulations 4 to 9 of the Cross-Border Mediation (Scotland) Regulations 2011
Article 9	Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information	The Scottish Government funded the setting up of the Scottish Mediation Register which allows members of the public to search on the internet for a mediator in a specific area of work, in the geographical location of	<u>Administrative Implementation as detailed in the comments section.</u>

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	<p>on how to contact mediators and organisations providing mediation services.</p>	<p>their choice and to see whether the mediator or mediator organisation meets minimum standards in the areas of training, initial mentoring, CPD, codes of conduct, complaints handling processes and indemnity insurance</p> <p>The family law website (<a href="http://www.scotland.gov.uk/familylaw">www.scotland.gov.uk/familylaw</a>) and publications (available on the website) also contain links to family mediation organisations. The publications have been distributed widely.</p> <p>'Relationships Scotland' is a voluntary organisation which receives funding from the Scottish Government and has an active website which advertises what they offer nationally and locally, including details of local services. They aim to promote the delivery of counselling, mediation and family support for Scotland's people</p>	
Article 10	<p>The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).</p>		<p><u>No transposition.</u></p> <p><u>This relates to the role of the Commission and does not impose an obligation on Member States.</u></p> <p><u>Article 6.3 (to which Article 10 refers) was administratively implemented as detailed above.</u></p> <p><u>No transposition.</u></p>
Article 11	<p>Not later than 21 May 2016, the</p>		

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	<p>Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the EU and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.</p>		<p>This relates to the role of the <u>Commission and does not impose an obligation on Member States.</u></p>
Article 12	<p>1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.</p> <p>2. When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.</p> <p>3 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this</p>	<p>21 May 2011 is the deadline by which the Directive must be given effect.</p>	<p>The Cross-Border Mediation (Scotland) Regulations 2011 will come into force on 6 April 2011.</p> <p>The regulations refer to the Directive.</p> <p>Article 12.3 will be implemented by provision of information to the Commission via UK government officials.</p>

ARTICLE	TEXT OF DIRECTIVE PROVISION	COMMENTS	IMPLEMENTATION
	Directive.		
Article 13	This Directive shall enter into force on the 20 <sup>th</sup> day following its publication in the Official Journal of the EU.	The Directive was published on 24 May 2008 (O.J. L 136, 24.5.2008, p3).	No transposition
Article 14	This Directive is addressed to the Member States		No transposition